BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
	)	
A National Broadband Plan for Our Future	)	
	)	
	)	

To: Wireline Competition Bureau

REPLY COMMENTS OF THE ALLIANCE FOR FAIR POLE ATTACHMENT RULES

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Duke Energy Corporation
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UNITED STATES OF AMERICA
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REPLY COMMENTS

Pursuant to sections 1.415 and 1.419[1] of the Federal Communications Commission's ("FCC" or "Commission") rules, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (collectively hereinafter "the Alliance for Fair Pole Attachment Rules" or "the Alliance"), by their counsel, hereby submit their Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking in the above captioned proceedings seeking comment on issues relating to the Commission's implementation of section 224.[2]

EXECUTIVE SUMMARY

In its initial comments, the Alliance for Fair Pole Attachment Rules ("the Alliance") expressed support for several core conclusions in the FNPRM, including conclusions that: a

[1] 47 C.F.R. §§ 1.415 and 1.419 (2009).

[2] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84, (2010), as corrected on August 3, 2010, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (hereinafter "FNPRM Proceeding"), WC Docket No. 07-245, GN Docket No. 09-51, Proposed Rule; Correction, FCC 10-84 (2010) (hereinafter "Order and FNPRM" or "FNPRM").

uniform rate for jurisdictional pole attachments should be as "close to uniform as possible, consistent with [s]ection 224;"[3] and "no single set of rules can take into account all the issues that can arise in the context of a single installation or attachment."[4] The Alliance also stated that the Commission correctly proposes no change to its "current approach" to the regulation of ILEC attachments — which is not to regulate them at all.

The Alliance offers a constructive, flexible approach to Federal pole attachment regulation that is consistent with these core conclusions and with the Commission's current approach with respect to ILEC attachments. The Alliance is pleased that the overwhelming majority of evidence submitted in the record of this proceeding by commenters in both the electric and communications industries supports its alternative approach. The Alliance is also pleased that much of the legal analysis provided by commenters in both industries clarifies the limitations of the Commission's authority to "reinterpret" the statute to achieve its policy goals.

In stark contrast to the Alliance's approach, however, a number of comments from segments of the communications industries are inconsistent with the Commission's core conclusions and based on manifestly erroneous arguments that ignore the statute or cite precedents that stand for the opposite of the point the commenter is attempting to make (or simply do not mention the issue in question at all).

Rates. The Alliance agrees with the proposals of the Edison Electric Institute ("EEI") and other electric industry groups to apply the section 224(e) telecom formula to all broadband attachments based on historic, capital costs. The Alliance urges the Commission to reject proposals to apply the cable rate to attachments used for broadband, including any proposal to

[3] *Id.* at para. 115.

[4] *Id.* at para. 24.

apply the cable rate to attachments used for commingled cable and broadband services. The Commission should finally put to rest the old canard that the Supreme Court's decision in *NCTA v. Gulf* somehow upholds that cable rate when in fact the Court expressly states that the question of which rate the Commission should apply to commingled services is "a question not now before us."[5]

The Alliance agrees with numerous commenters — including the National Cable Telecommunications Association ("NCTA") — that the statutory telecom formula does *not* allocate costs on a cost-causation basis. The Commission should also reject the tiresome reiteration of the proposal that the Commission is somehow authorized to exclude capital costs from the calculation of the telecom rate or to otherwise rely on "cost causation principles" as the basis for a uniform rate for broadband attachments: the statutory telecom rate, as even NCTA admits, is based on cost allocation, not cost causation. Specifically, the section 224(e) formula expressly provides for allocations of the costs of the whole pole, not merely the marginal or "additional" costs of a new attachment.

Comments urging the Commission to limit capital cost payments to make-ready charges miss the point. Up-front payment of make-ready charges does not excuse the attaching entity from paying for its fair share of the costs of the existing pole infrastructure network — a network without which the communications industry would have to secure its own rights-of-way and build its own network at its own astronomically prohibitive expense.

As EEI proposes, the Commission should modify the presumptions used in determining the space factor used in calculating the telecom rate and to better reflect actual conditions in the field as follows: (i) allocate the communications worker safety zone space to common ("other

[5] *Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002).

than usable") space; (ii) establish a presumption of two (or three if the utility is counted) attaching entities per pole for both urban and rural areas; (iii) do not count the utility as an "attaching entity" in calculating the allocation of common space; (iv) ensure that each attached item is counted as a separate attachment; and (v) ensure that space allocations for special types of attachments reflect the full amount of space used by each such attachment.

Regarding the presumed number of attaching entities, the Alliance urges the Commission to acknowledge that the overwhelming majority of the evidence submitted in this proceeding by both electric and communications industry commenters demonstrates that a presumed number of three (including the utility) attaching entities best reflects prevailing actual conditions in both urban and rural areas and should therefore be adopted.

Wholly without merit are comments proposing to limit the rights of electric utilities to rebut the presumed number of attaching entities used in calculating the telecom rate and to change the presumed number of attaching entities to a number that is *higher* than prevailing actual averages. The great weight of the evidence submitted in the record of this proceeding by both the electric and cable industries shows that the number of attaching entities in both urban and rural areas is far fewer than the presumed numbers the Commission originally expected. Compellingly, the record shows typical utility-wide averages of substantially fewer than three attaching entities per pole (including the electric utility itself) in *both* urban and rural areas.

The Commission should reject proposals to establish a one-size-fits-all rate for wireless attachments. To the extent the Commission chooses to address rates for wireless attachments (which is not necessary), the Commission should ensure that such rates take into account the full amount of space occupied by each such attachment regardless of whether the wireless attachment "displaces" other attachments. Wireless commenters apparently seek squatter's rights to any space also required by existing attachers — an approach that is both discriminatory and contrary to the requirement of the statute that an attacher pay its prescribed share of the costs for all of the space such attacher "requires" for the attachment.

Make-Ready. In general, the Alliance agrees with the views of the State regulator participants in the Commission's recent pole attachment workshop, who repeatedly observed that their approach is to provide only general guidelines and to leave the details of access and make-ready to the negotiations of the private parties. There is little or no support in the record for the FNPRM's proposed departure from its well-established case-specific approach to these issues — and much opposition from both the electric and broadband industries.

The Alliance agrees with the comments of the entire electric industry and numerous broadband providers that specific timelines are unnecessary and unrealistic. The Alliance is struck by how little support is expressed for the proposed timeline, even by broadband providers — who obviously have a strong interest in speedy access to poles. Cable industry reactions to the timeline otherwise range from strong opposition or silence to, at best, vague assents tucked away in footnotes. If the Commission, despite a lack support in the statute or the record, still determines to adopt a timeline, the Alliance agrees with ILEC commenters that such timeline must be subject to a "rule of reason" to allow utilities additional time to address circumstances beyond their reasonable control.

The Commission should reject proposals to establish specific timelines for any aspect of the pole attachment process, including make-ready and negotiation of master attachment agreements — whether for wireline or wireless attachments. Proposals to permit applicants to pay make-ready charges in "stages" would impermissibly force electric utilities to act as "the bank" and should, therefore, be rejected. Contrary to several proposals, applicants have no right to "opt in" to existing attachment agreements. Such a right has no statutory basis, is contrary to the negotiated-agreement approach recognized in the statute and long upheld by the Commission, and, in any event, could not extend to ILEC-electric joint-use agreements, which are not subject to the Commission's jurisdiction.

The Commission should also reject proposals to require electric utilities to allow non-electric-qualified outside contractors to work in the electric power space. The statute, applicable Federal regulations, industry safety codes, and common sense dictate that workers entering the electric power space must be trained and certified to do so. The utility's right to "deny access to its poles" for reasons of safety is meaningless if it cannot deny access to the electric power space on its poles by dangerously under-qualified workers. Because electric wires are the same whether they are attached to poles owned by ILECs or the electric utility itself, the same stringent standard for worker qualifications should apply on all poles.

Contrary to the claims of several wireless commenters, there is no absolute right to pole-top access. On the contrary, as the Commission and even the wireless commenters acknowledge, the utility has the right to deny access to its poles — including the tops of those poles — on a nondiscriminatory basis for reasons of safety. As the wireless commenters' citations to the National Electric *Safety* Code amply illustrate, pole top access very much involves safety issues.

The record shows overwhelming opposition to the FNPRM's proposed database of pole information. The Alliance agrees with several broadband industry commenters that such a database would be ineffective, extremely costly, virtually impossible to maintain, and could (assuming accurate data could ever be maintained) simply provide a roadmap for unauthorized attachers.

Compensatory Damages. Comments urging the Commission to extract "compensatory damages" from electric utilities claim that such remedy is both "long overdue" and also somehow "already … available" under existing Commission precedent. The Commission cases cited either nowhere mention compensatory damages or simply acknowledge the *contractual* right of the *electric utility* to penalize unauthorized attachers by seeking damages in court — no presumed right of the Commission under section 224 to "award" compensatory damages is even suggested. These cases apparently being the only "support" in the record for the Commission's compensatory damages proposal, the Alliance requests that the Commission set aside the proposal.

Forbearance. In response to proposals that the Commission should, pursuant to section 10 of the Communications Act, "forbear" from applying the telecom rate and instead apply the cable rate to broadband attachments, the Alliance cautions that, if used against the electric industry, section 10 is likely to be overturned by the courts as an unconstitutional delegation of legislative power to the Commission. In any event, section 10 does not apply to electric utilities or pole attachments, and is intended to be used only to deregulate, not to "re-reregulate" by substituting one set of regulations for a different, more expedient, set of regulations.

ILEC Attachments. The ILECs brazenly assert that section 224 "unquestionably" provides attachment rights to ILECs. This assertion is simply laughable, considering that the Commission, Congress, the courts, the cable industry, and even the ILECs themselves, have all long understood just the opposite: that ILECs have no attachment rights under section 224. As Comcast states in its comments on the Commission's 2007 Notice of Proposed Rulemaking ("NPRM"), "ILECs are not protected attachers under section 224."

I. RATES

A. The Commission should reject proposals to apply the cable rate to attachments used for broadband services and should instead apply the telecom rate to all such attachments.

The Commission should reject proposals by Comcast and others to apply the cable rate to attachments used for broadband services.[6] These proposals for a dual-rate structure neither satisfy the Commission's policy objective of establishing a "uniform" rate nor comply with the requirements of section 224(e). Also, commenters' arguments that the cable rate has been "upheld" as just and reasonable for purposes of 224(d) are irrelevant to the statutory requirements for implementing the telecom rate pursuant to section 224(e).

1. The proposed dual-rate structure is contrary to the Commission's own finding that there should be a uniform rate for broadband attachments.

As a policy matter, the two-tier, cable-rate "backstop" approach does not achieve the Commission's stated goal of establishing a *uniform* rate for broadband attachments. Instead, it establishes what could be called a "duoform," sometimes-one-rate-other-times-a-different-rate methodology. The National Broadband Plan recommends that the Commission establish pole rental rates that are as "uniform as possible, consistent with [s]ection 224 of the [Act]."[7] "Rather than deviating from the statutory telecom rate formula," the Commission in the FNPRM seeks

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[6] Comcast supports the FNPRM's "approach of applying the cable rate whenever it exceeds the lower bound rate." FNPRM Proceeding, Comments of Comcast Corporation at 15 (filed August 16, 2010) ("Comcast Comments"). Similarly, Time Warner Cable urges the Commission to adopt the cable rate as the "upper bound of its rate structure for telecommunications services attachments." FNPRM Proceeding, Comments of Time Warner Cable, Inc. at 12 (filed August 16, 2010) ("Time Warner Cable Comments").

[7] FNPRM at para. 115, quoting *Omnibus Broadband Initiative*, Federal Communications Commission, Connecting America: The National Broadband Plan, at 110 (2010) ("National Broadband Plan").

comment on ways to “reinterpret the section 224(e) telecom rate formula.”[8] Any proposal to apply the section 224(e) rate to some broadband providers and the section 224(d) rate to other broadband providers would neither provide “uniformity” nor be consistent with the “statutory telecom rate formula.” As explained below, the beneficiaries of the Commission’s two-rate proposal understand that the low-end telecom rate will result in an unconstitutionally confiscatory rate and therefore must be equipped with a cable rate safety valve. Such proposals, however, clearly “deviate” from the statutory telecom formula and would therefore arbitrarily deviate from the Commission’s own stated goals of uniformity within the existing 224(e) framework. As explained below, a better alternative is to use the statutorily required cost allocation methodology of the existing telecom rate (with appropriate modifications to the space factor presumptions).

2. The proposed two-rate method is contrary to the requirements of section 224(e).

As a legal matter, this dual rate approach suffers from two basic flaws: (1) it is discriminatory in violation of section 224(e); and (2) it lacks a statutory basis because only the telecom rate can apply to telecommunications carriers.

a. Applying two different rates to different telecommunications providers is discriminatory in violation of section 224(e).

Section 224(e) requires the Commission to ensure that rates for pole attachments are nondiscriminatory. As explained below, “nondiscriminatory” means selling the same thing at two different rates.[9] A two-rate scheme under which different rates apply to different parties

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[8] *Id.* at para. 122.

[9] *See* Section I.C.3. In the context of rates for a service, discriminatory pricing simply means charging two different rates to two different customers where there is no difference in the cost to provide the service. As the Commission has stated in the context of section 251(d)(1)

depending on the result of the rate calculations is therefore patently discriminatory. Specifically, applying the cable rate to one set of parties and the "low end" telecom rate to a different set of parties is pure discrimination. As the Commission and the courts have recognized, the cable rate and the telecom rate are two different rates, and Congress intended that the telecom rate be higher.[10] The fact that the Commission's general policy objective may be to make the resulting rate "as close as possible" to the cable rate in each instance does not cure the discriminatory effect in any specific case. Two different rates are just that — two different rates.

b. Only the telecom rate can be applied to telecommunications carriers.

As explained in the Alliance's initial comments and the VoIP petition filed last year by several Alliance companies, the statute plainly requires the Commission to apply the section 224(e) rate to any attachment by "telecommunications carriers to provide telecommunications services."[11] The plain text of section 224(e) affords the Commission no discretion to apply any rate other than the section 224(e) rate to providers of broadband telecommunications services. To the extent the Commission's "uniform" rate applies to broadband providers who are telecommunications carriers, that rate must, therefore, be the telecom rate.

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regarding interconnection rates, the "economic definition of price discrimination" is "the practice of selling the same product at two or more prices where the price differences do not reflect cost differences . . . ." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order para. 860, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (1996) ("Local Competition Order"), *citing* David L. Kaserman & John W. Mayo, Government & Business: *The Economics of Antitrust & Regulation* at 273-74 (1995) (emphasis added).

[10] *See Alabama Power v. FCC*, 311 F.3d 1357, 1371 and n. 23 (stating that "Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates" and that the telecom rate "yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments.") (internal citations omitted).

[11] 47 U.S.C. § 224(e)(1).

3. Arguments that the cable rate has been found to be "just and reasonable" prove nothing and do not trump the requirements of section 224(e).

Comcast's sole legal argument in favor of applying the cable rate is that the courts have found the cable rate to be just and reasonable.[12] This point proves nothing. The courts have also on every occasion found the existing telecom rate to be just and reasonable.[13] Also, Comcast ignores the restrictions of section 224(e). No court decision "upholding" the cable rate trumps the plain language of section 224(e), which provides that the telecom rate formula apply to any attachment by a telecommunications carrier providing telecommunications services and that rates must not be discriminatory.

B. The Commission must apply the telecom rate to commingled cable and broadband services regardless of whether such services have yet been classified as "telecommunications."

Bright House and the American Cable Association ask the Commission to "reaffirm" that the cable rate should apply to attachments used for cable service commingled with services that

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[12] Comcast Comments at 16. Time Warner Cable makes the argument that, under section 224, "the upper bound for any pole attachment rate, including the Telecom Rate, cannot exceed the upper limit of the zone of reasonableness established under subsection (d)(1)" and cites the legislative history of the Communications Act Amendments of 1982 in support. Time Warner Cable Comments at 13. In reply, suffice it to say that Congress *amended* section 224 in 1996 to establish a new, separate telecom rate which it specifically expected would result in rate increases. Subsection (d) does not trump the plain language of subsection (e).

[13] See *Alabama Power v. FCC*, 311 F.3d at 1371 n. 23, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49 (noting that "[t]he FCC reached a perfectly logical conclusion when it observed: 'Congress' decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment."); *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003) (holding that the telecom rate provides just compensation).

are not (yet) classified as "telecommunications services" for purposes of Title II regulation.[14] The Commission must reject for the following reasons.

1. Grandfathering cable broadband providers under the cable rate is contrary to the Commission's stated goal of establishing a uniform rate consistent with section 224(e).

As explained above, the Commission's stated goal is to establish a rate for all broadband attachments that is as "uniform as possible" and that does not deviate from the statutory section 224(e) telecom rate.[15] Bright House and ACA are asking the Commission to carve out the historic section 224(d) cable rate for a subset of broadband providers — i.e., cable companies that provide commingled cable service and broadband internet service. This proposal thus undermines the National Broadband Plan's stated policy goal of establishing "uniform" rates. As the Plan observes, "applying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions."[16] Bright House's and ACA's proposal would perpetuate such distortion. The proposal to retain a two-track rate framework would also thwart the Commission's goal of avoiding "disputes about the applicability of 'cable' or 'telecommunications' rates to broadband, voice over Internet protocol and wireless services, among others."[17] A separate 224(d) "grandfather track" for cable internet would also obviously deviate from the Commission's stated approach of applying the existing 224(e) telecom rate to all broadband attachments.

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[14] FNPRM Proceeding, Comments of Bright House Networks at 5 (filed August 16, 2010) ("Bright House Comments"); Comments of the American Cable Association at 6 (filed August 16, 2010) ("ACA Comments") (urging the Commission to "retain the existing cable rate for cable operators providing video and internet services").

[15] FNPRM at para. 122.

[16] National Broadband Plan at 110, quoted in FNPRM at para. 115.

[17] FNPRM at para. 115.

2. The nondiscrimination requirement of section 224(e) requires that any uniform broadband rate must be the existing statutory telecom rate, regardless of whether a particular broadband service has been classified as "telecommunications service."

Section 224(e) provides for a rate formula for pole attachments made by "providers of telecommunications services" — i.e., the telecom rate formula.[18] The same subsection (e) provides that the Commission must "ensure that a utility charges just, reasonable, *and nondiscriminatory* rates for *pole attachments*."[19] "Pole attachment," in turn, is defined as "any attachment" by a cable system or provider of telecommunications services.[20] In this context, "nondiscriminatory" means "the same rate"[21] — i.e., the same as the telecom rate. The use of the term "nondiscriminatory" indisputably establishes a very stringent standard.[22] The statute

[18] *In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. at 17-22 (filed August 17, 2009) ("VOIP Petition").

[19] 47 U.S.C. § 224(e) (emphasis added).

[20] 47 U.S.C. § 224(a)(4).

[21] As the Commission has stated in the context of section 251(d)(1) regarding interconnection rates, the "economic definition of price discrimination" is "the practice of selling the same product at two or more prices where the price differences do not reflect cost differences . . . ." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order para. 860, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (1996) ("Local Competition Order") *citing* David L. Kaserman & John W. Mayo, Government & Business: *The Economics of Antitrust & Regulation* at 273-74 (1995) (emphasis added).

[22] *See, e.g.,* Local Competition Order at para. 859 (stating that "[w]e conclude that the term 'nondiscriminatory' in the 1996 Act is not synonymous with 'unjust and unreasonable discrimination' in section 202(a), but rather is a more stringent standard. Finding otherwise would fail to give meaning to Congress's decision to use different language").

does not say "unduly discriminatory,"[23] "unjust and unreasonable discrimination,"[24] or the like. There is no "wiggle room." Thus, where no other rate is expressly provided by the statute,[25] the telecom rate is the applicable, nondiscriminatory rate.[26]

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[23] *Compare* 47 U.S.C. § 542 (g)(2)(A) (excluding from the definition of "franchise fee" any fee which is "*unduly* discriminatory against cable operators") (emphasis added); Federal Power Act provision for Federal Energy Regulatory Commission review of transmission rates, 16 U.S.C. § 824e(a) ("Whenever the Commission … shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, *unduly* discriminatory or preferential, the Commission shall determine the just and reasonable rate") (emphasis added).

[24] *See, e.g.,* Local Competition Order at para. 217. In this order, the Commission finds:

> Section 202(a) of the Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person." By comparison, section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.

[25] The only possible exception to the nondiscrimination rule for jurisdictional attachments is where the statute expressly carves out a different rate for a specific category of pole attachments, as in the case of the section 224(d) rate for attachments used "*solely* to provide cable service." 47 U.S.C. § 224(d) (emphasis added). As explained in part IV below, the Supreme Court in *Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co*., held that the Commission has authority to regulate cable attachments used for commingled cable and internet service. Although the Commission in that case applied the cable rate to such attachments, the issue of whether the Commission chose the correct rate was not before the court. *See, Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*") (stating that "the rate the FCC has chosen [is] a question not now before us").

[26] Section 224(e) expressly requires that the telecom rate apply to all attachments used by telecommunications carriers to provide telecommunications services, i.e., CLECs. Thus, logically, if the telecom rate applies to one category of attachers (i.e., CLECs), but no rate is specified for another category of attachers (e.g., cable system attachments used to provide

As a result of this stringent statutory standard, to avoid rate discrimination, the Commission must use the same rate for CLECs and all other "pole attachments" (i.e., all attachments subject to its jurisdiction). The statute makes no separate provision for attachments used for cable service commingled with internet services. Applying the cable rate to cable system attachments used for internet or other broadband services functionally identical to broadband services provided by CLECs clearly discriminates between two categories of "pole attachments": (1) CLEC attachments used to provide internet service; and (2) cable attachments used to provide internet service. Accordingly, the only permissible, nondiscriminatory rate possible for cable internet attachments under the statute is the section 224(e) telecom rate.

3. *NCTA v. Gulf* does not support the proposal to "reaffirm" the cable rate for commingled services.

Bright House asserts that the Supreme Court in *NCTA v. Gulf Power*[27] found it "well within the agency's authority" to apply the cable rate to such commingled services.[28] Bright House's claim is both false and irrelevant to the issue at hand. *NCTA v. Gulf* neither upheld the Commission's rate choice nor addressed the issue of discrimination.

The often-repeated canard that *Gulf Power* upheld the Commission's choice of the cable rate for commingled service has no foundation in the court's opinion. In fact, the Court specifically notes that its decision addresses only a narrow question of jurisdiction over cable attachments used for commingled services, *not* the distinct question of whether the specific rate chosen by the Commission is permissible: "In this suit . . . we address only whether pole

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commingled cable and VoIP), then the nondiscriminatory (i.e., same) rate for both categories must be the telecom rate.

[27] *NCTA v. Gulf Power*, 534 U.S. 327.

[28] Bright House Comments at 10.

attachments that carry commingled services are subject to FCC regulation at all," not "the rate the FCC has chosen, a question not now before us."[29] Still less did the Court take up the issue of whether the rate chosen was discriminatory. The Court simply does not opine on the discrimination language — or any language — in section 224(e).

C. The statutory telecom rate is based on cost allocation, not "cost causation."

Despite the Commission's lack of statutory authority and its well-established precedent that the telecom rate is based on cost allocation, several commenters claim that the revised telecom rate should be based on "cost causation principles" or "marginal cost principles."[30] No matter how often or how eagerly they repeat this claim, they are still wrong.

1. The statutory telecom rate is properly based on allocation of actual costs, not "cost causation."

As explained in the Alliance's comments, the proposal to exclude capital costs from the lower bound telecom rate exceeds the Commission's authority under section 224, because section 224(e) employs a specific formula which provides for allocation of the actual costs — including capital costs — of providing pole space, not a cost-causation approach.[31] By contrast, under a cost-causation approach, costs are allocated based on whether an entity is "causally responsible for the incurrence of a cost."[32] Recognizing the requirements of the statute, the Commission has not previously attempted to limit cost recovery under the telecom rate to

[29] *NCTA v. Gulf Power*, 534 U.S. at 338.

[30] *See, e.g.,* FNPRM Proceeding, Comments of TW Telecom and Comptel at 7-10 (filed August 16, 2010) ("TW Telecom and Comptel Comments"); Comcast Comments at 14; Time Warner Cable Comments at 5-11; Bright House Comments at 4 (asserting that "[c]ost causation principles instruct that no higher rates be imposed" for commingled cable and other services).

[31] FNPRM Proceeding, Comments of the Alliance for Fair Pole Attachment Rules at 90-95 (filed August 16, 2010) ("Alliance Comments").

[32] FNPRM at para. 134.

marginal costs, and it would be arbitrary and capricious for the Commission to do so now.

Cable, CLEC, and wireless commenters have all jumped on the "cost causation" bandwagon. They seem to assume that, if the falsehood that the telecom formula is based on marginal cost is repeated often enough, it will become true. DAS Forum, for example, asserts that the telecom rate, "*by statute* … [is] based on the costs of adding the attachment."[33] The Alliance is unsure which statute DAS Forum means, because section 224(e) neither mentions nor in any way suggests that the Commission has the option of interpreting the telecom rate to include only additional or marginal costs.

All of these commenters are wrong because they are asking the Commission to turn the telecom rate into something fundamentally alien to what the statute prescribes. There is no statutory basis for limiting the telecom rate's cost basis to marginal costs or costs "caused" by the attacher.

a. Section 224(e) requires allocation of the costs of the whole pole.

Section 224(e) provides for allocation of the costs of providing "space" on the whole pole — both usable and common (i.e., "other than usable") space of the pole.[34] The statute requires that the costs of the pole space itself be the cost basis for the rate, not the portion of such costs "caused" by the attaching entity. Specifically, section 224(e)(3) requires that the usable space be

[33] FNPRM Proceeding, Comments of the DAS Forum at 24 (filed August 16, 2010) ("DAS Forum Comments"); *see, e.g.*, FNPRM Proceeding, Comments of CTIA-The Wireless Association at 16 ("CTIA Comments") (urging adoption of a uniform rate "that incorporates more efficient marginal cost principles"); Time Warner Cable Comments at 7 (asserting that removing capital costs from the existing telecom rate "is entirely warranted and consistent with principles of cost causation.").

[34] Cable or CLEC attachers do not "cause" the cost of the common space on the pole, except in the circumstance where a new pole is needed in order to make space for an attacher. The common space on the pole is required due to ground clearance requirements and those costs exist whether or not there is a third-party attacher.

allocated, regardless of whether the space is created by pole replacement or is simply "already there." Section 224(e)(2) provides that attachers must bear a portion of the costs of the "other than usable" space, regardless of who "caused" that space to be provided in the first place. In its 2001 Reconsideration Order, the Commission recognized that annual pole attachment rates properly include an allocation of capital costs other than the additional costs of the attachment (i.e., other than the costs paid "up front" in the (non-recurring) make-ready process) and there is no reason to depart from this precedent.[35]

b. Congress intended the Commission to use a historic capital cost methodology for calculating the telecom rate.

Further, Congress intended that the Commission use a capital cost-based methodology for calculating the telecom rate. Specifically, as the Commission acknowledged in its Reconsideration Order, Congress expected the Commission to continue to use a historical cost methodology, which encompasses all associated capital costs:

> The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.[36]

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[35] In the 2001 Reconsideration Order, the Commission clearly delineates non-recurring capital costs (make-ready for new construction) from recurring capital costs, and confirms that both sets of capital costs are recoverable by the utility under section 224. *See Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration at n.120 and para. 71, FCC 01-170 (2001) ("2001 Reconsideration Order").

[36] 2001 Reconsideration Order at para. 22, *citing Implementation of Section 703(e) of the Telecommunications Act of 1996*, *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at paras. 122-124, FCC 98-20 (1998) ("Telecom Order"); *see also, Amendment of Rules and Policies Governing Pole*

Moreover, Congress intended that all such historical costs be fully allocated among the attaching parties. Specifically, as the Commission recognized in its 1996 order implementing the 1996 Act amendments to section 224, the telecom rate formula requires that,

> in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way. In order to implement these new formulas, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.[37]

Consistent with the plain text of the statute, the Commission thus made clear that the telecom rate formula provides for an allocation of all the costs of the pole. Throughout the proceedings implementing the 1996 Act amendments to section 224, the Commission nowhere hinted that the telecom rate calculation should be limited to marginal costs or costs "caused" by the attaching party. Given the plain text of the statute, any attempt to limit the scope of costs recovered under the telecom rate in this manner would be a gross derogation of the Commission's duty to implement the statute.

c. Cable and CLEC comments show that the low-end telecom rate proposal leads to absurd and, therefore, unreasonable results.

The FNPRM's "reinterpretation" of the statutory telecom rate would create out of whole cloth a new, capital cost-free "low-end" rate that has no foundation in the statute. The comments of several cable and CLEC industry parties, in their eagerness to support the FNPRM's novel

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Attachments, CS Docket No. 97-98, Report and Order at paras. 8-11, FCC 00-116 (2000) ("Fee Order").

[37] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of* 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS

proposal, only demonstrate the absurd consequences that would result from adoption of a low-end rate that excludes capital costs. Charter Communications, Inc. ("Charter") admits that "the fully allocated cable rate will in most cases yield a higher rate" than the low-end telecom rate.[38]

As explained in the Alliance's initial comments, the text, structure, and legislative history of section 224, as well as more than a decade of Commission practice, show that the telecom rate was intended to be substantially higher than the cable rate.[39] As stated in a House Report leading to the adoption of the 1996 Act amendments to section 224, "[t]he *beneficial* rate to cable companies was established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[40] In 1996, no one thought that the telecom rate would provide an *even more* beneficial rate to the cable industry (which was certainly no longer in its infancy). On the contrary, Congress expressly provided for a five-year phase-in period for expected rate *increases*.[41] Accordingly, it would be simply absurd to "reinterpret" the telecom rate in such a way that it would result in a rate lower than the historic cable subsidy rate.

TW Telecom and Comptel acknowledge that exclusion of capital costs would result in a non-compensatory rate and therefore would require a "plus factor" added to marginal costs in calculating the formula.[42] "Non-compensatory" means confiscatory and, therefore, below the

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Docket No. 96-166, Order at para. 6, FCC 96-327 (1996) (emphasis added) ("1996 First Report and Order") *citing* 47 U.S.C. § 224(e)(2) as added by 1996 Act, § 703.

[38] FNPRM Proceeding, Comments of Charter Communications, Inc. at 9 (filed August 16, 2010) ("Charter Comments") (*citing*, FNPRM at para. 141 and Appendix A).

[39] Alliance Comments at 83-86.

[40] H. Rpt. 104-204 at 91 (emphasis added).

[41] *See* 47 U.S.C. § 224(e)(4); *see also* S. Rpt. 104-230, Conference Report Communications Act of 1995 at 206 (February 1996) (stating that "[s]uch rates will take effect five years from date of enactment and be phased in over a five-year period.").

[42] TW Telecom and Comptel Comments at 9.

lower end of the zone of reasonableness under the just and reasonable standard. TW Telecom and Comptel thus recognize that the FNPRM's proposed low-end rate would result in an unjust and unreasonable rate, which could only be cured by adding a so-called "plus factor" that likewise has no statutory basis. Section 224 requires that pole attachment rates be just and reasonable. The Commission has no authority to adopt a rate methodology that — as even the CLECs who would benefit from such a methodology admit — inherently generates unjust and unreasonable rates; it would, therefore, be absurd for the Commission to attempt to do so. The statute is clear: the telecom rate formula provides for an allocation of the actual costs of providing pole space, of which capital costs are a substantial portion. No amount of rejiggering or tweaking of the FNPRM's low-end approach can fix that approach's fundamental flaw: it provides for no allocation of capital costs. Any construction of the statute that must be corrected using non-statutory add-ons is inherently unreasonable and should be rejected.

d. NCTA correctly concedes that the statutory telecom formula does not allocate costs on a cost-causation basis.

Even cable commenters in this proceeding expressly concede that the statutory telecom rate does not allocate costs on a "cost causation" basis. The problem, according to these commenters, is the congressionally mandated telecom formula itself. NCTA urges the Commission to depart from the statutory formula and, instead, adopt a cost-causation methodology because the "cost allocation requirement in section 224(e) apportions the cost of the pole not solely on the basis of occupancy (i.e., one that adheres to principles of cost causation) but rather on a per-capita basis."[43] Specifically, the "underlying costs of the pole that are currently being allocated under the telecom formula are fully allocated costs (the same as

[43] FNPRM Proceeding, Comments of the National Cable and Telecommunications Association at 13 (August 16, 2010) ("NCTA Comments").

under the cable formula)."[44] The cable formula, as currently implemented, allocates the actual capital costs. Thus, as NCTA acknowledges, the telecom formula *by statute* allocates actual capital costs, not merely marginal costs.

e. The language of section 224(d) is irrelevant to the meaning of "costs" in section 224(e).

NCTA claims that the general term "costs" in 224(e) does not have the same meaning as the more specific term "actual capital costs" in 224(d).[45] The language of 224(d), NCTA reasons, does not "constrain" the meaning of the term "costs" in 224(e). NCTA cites a canon of construction that "the meaning given a particular term in one section of a statute does not necessarily dictate the meaning attributed to the same term used in the same statute."[46] The rule of construction and supporting string of cases cited by NCTA prove nothing and, indeed, could just as easily prove the opposite of NCTA's favored conclusion.[47] The relevant questions are, rather: (1) What does the text of 224(e) say? and (2) Would absurd consequences result from interpreting the term "costs" in 224(e) to mean only marginal costs? The answer to these questions is that 224(e) provides for an allocation of the costs of the whole pole and that limiting the telecom rate calculation to marginal costs would have the absurd result of rendering the cost allocation language meaningless.

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[44] *Id.* at Attachment A, Report of Patricia D. Kravtin at para. 20.

[45] *Id.* at 14.

[46] *Id*.

[47] Specifically, the fact that section 224(d) also references the "additional costs of providing pole attachments" does not "constrain" the term "costs" in 224(e) to mean only additional or marginal costs.

As explained above and in the Alliance's initial comments, section 224(e) prescribes an allocation of the actual costs of the whole pole, which necessarily include capital costs.[48] Nowhere does the Alliance, or any other party in this proceeding known to the Alliance, argue that the specific cost language in section 224(d) "constrains" the meaning of the term "costs" in section 224(e). No resort to the language of 224(d) is needed to interpret 224(e). On the contrary, in 224(e)'s language regarding costs, *res ipsa loquitur*.

The applicable canon of statutory construction in this case is that every word of the statute must be given meaning.[49] Applying this canon to the cost allocation language of section 224(e) as compared to that of 224(d), it is apparent that the whole point of the section 224(e) formula is to allocate a larger share of the common space to each attaching entity and, in turn, a higher rate than the cable rate. As explained above, section 224(e) expressly provides for recovery of the "cost of providing space" on the pole as a whole — i.e., both the cost of providing "usable" space and the cost of providing the common (other-than-usable) space. There must be a whole pole in existence for a communications provider to have any usable platform to which it can attach. Section 224(e) therefore reasonably allocates to that communications provider a portion of both the costs of the "platform" and the cost of the rest of the pole needed to provide for required ground clearance.

By providing for a different space allocation, Congress intended to provide for a different rate. If the term "costs" in section 224(e) were construed to mean anything other than the sum of operating expenses and actual costs attributable to the whole pole, the cost-allocation formula language would have no purpose or meaning. Any such construction of the term "costs" in

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48 Alliance Comments at 90-95.

49 *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

section 224(e) that would render the cost-allocation language pointless — and thereby yield a telecom rate that is the same as (or lower than) the cable rate — would therefore be contrary to the plain language of the statute and, in any event, unreasonable.

f. If Congress had intended to narrow the meaning of "costs" in 224(e) to mean only additional costs it would have specified thus as it did in 224(d).

As explained above, under the "whole statute" rule of construction, a term must be interpreted in context. If the context implies a general meaning of a term, it cannot be construed more narrowly absent express limiting language.[50] Section 224(e) as a whole provides for an allocation of *all* the costs of the pole, not merely the additional costs caused by a new attachment. Thus, if Congress had intended to limit the meaning of "costs" in 224(e) to additional or incremental costs, it would have expressly provided accordingly. Congress did not do so. In section 224(e), Congress does not limit the term "costs" to a single subset of costs. Nor does it provide the Commission with a choice between two different sets or types of cost. Instead, section 224(e) instructs the Commission to allocate the sum of all the costs of the pole space — i.e., both usable and common space. By contrast, section 224(d) provides for an either/or method: either a single subset of costs (additional costs), or the sum of the operating expenses and actual capital costs of the pole (fully allocated cost). If Congress had intended to limit cost recovery under 224(e), it could have done so. That fact that it did not do so, considered in the context of the cost allocation language of 224(e), confirms that it intended the term costs in section 224(e) to include the costs of the whole pole, not just the additional costs of a new attachment.

[50] *See generally*, SINGER, NORMAN J & J.D. SHAMBIE, STATUTES AND STATUTORY CONSTRUCTION, § 47:7 (7th ed. 2007).

2. Make-ready payments do not excuse attaching entities from paying their statutorily prescribed share of the costs of the existing pole network.

NCTA argues that attachers "pay the entire amount of the capital costs attributable to their attachments in the form of make-ready payments" and should, therefore, not be required to pay any of the capital costs for the existing infrastructure which are not "caused" by the attaching entity.[51] NCTA reasons that the current telecom rate "inappropriately" requires telecommunications attachers to pay for certain capital costs that are "wholly unrelated" to their attachments. This argument violates common sense and the plain text of section 224(e).

a. It is reasonable for the attacher to pay its fair share of the cost of the existing pole network, not merely the additional costs of a new attachment.

To say that the historic costs of the existing pole network are "wholly unrelated" to telecommunications attachments wholly disregards one simple fact: if the electric utilities had not already built the pole network, NCTA's members would have no poles to which they could attach and would have to build their own network of poles in their own separate rights of way, solely at their own (astronomically prohibitive) expense. NCTA is, in effect, (still) saying: "You built the network; now we get to use it for free."

In the case of many attachments, make-ready costs are minimal because no pole replacement is needed. For example, Georgia Power Company reports that, in a recent attachment project, only four out of 294 poles were changed out to accommodate the new

[51] NCTA Comments at 12; *see also* Charter Comments at 13 (stating that "even if the capital costs were excluded from the calculation of the lower bound telecom formula, utilities would still recover all the capital costs incurred as a result of accommodating a pole attachment in the form of up-front make-ready payments.").

attachments.[52] In that case, if the applicant were required to pay only for make-ready, it would have been permitted to attach to the remaining 290 attachments rent-free. Such forced occupation of the utility's property without compensation not only violates the cost-allocation requirements of section 224(e) but could also obviously constitute an unconstitutional taking.[53]

b. Section 224(e) requires the attacher to pay for a portion of the costs of the existing pole network.

Second, as the Commission has always acknowledged, the statute not only requires the attaching entity to pay for incremental modifications *to* the network — but also for its prescribed share of the costs *of the network itself*. As explained above, the Commission has no statutory basis for calculating the telecom rate on a "cost causer" basis. Furthermore, as the Commission has repeatedly recognized, section 224(e) allows the electric utility pole owner to recover both its marginal costs related to the attachment and a prescribed share of its historic, capital costs of the existing pole infrastructure network. The annual pole attachment rates properly include an allocation of capital costs of the network, which are distinct from the capital costs paid "up front" in the (non-recurring) make-ready process.[54]

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[52] Letter from Joseph A. Lawhon, Counsel to Georgia Power Company and Southern Communications Services to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303, at Attachment B, slide 4 (filed Nov. 17, 2009).

[53] *See Alabama Power Co., v. FCC*, 311 F.3d 1357, 1367 (11th Cir. 2002). The *Alabama Power* court acknowledged that a pole attachment constitutes a physical occupation, but does not address whether no-rent at all constitutes just compensation.

[54] In the 2001 Reconsideration Order, the Commission clearly delineates non-recurring capital costs (make-ready for new construction) from recurring capital costs, and confirms that both sets of capital costs are recoverable by the utility under section 224. 2001 Reconsideration Order at n. 120 and para. 71.

3. The Alliance's proposal provides a just and reasonable alternative that is consistent with the Commission's statutory authority.

As explained in the Alliance's initial comments, the Commission has a statutory duty under section 224(e) to provide for non-discriminatory rates for all pole attachments used to provide broadband services.[55] A non-discriminatory rate formula simply means the same rate formula. Thus, because section 224(e) binds the Commission to apply the telecom formula to telecommunications carriers providing telecommunications services, the nondiscrimination mandate requires that the same formula apply to cable companies that also provide broadband services, regardless of how such services are otherwise classified for purposes of Title II regulation.[56] The Alliance, therefore, requests that the Commission apply the statutory telecom rate formula to *all* attachments used to provide broadband services.

Additionally, the Alliance agrees with EEI that the Commission should to reduce the remaining subsidies inherent in the telecom rate by modifying several presumptions used in the telecom rate formula to better reflect reality.[57] Specifically, the Commission should make the

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[55] Alliance Comments at 78; *see also, In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Comments of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc., (filed September 24, 2009); *In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (filed October 9, 2009).

[56] As expressly provided in section 224(d), the historic cable rate would apply only to cable attachments used "solely to provide cable service." *See* 47 U.S.C. § 224(d).

[57] *See, e.g., In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of the Edison Electric Institute and the Utilities Telecom Council at 102-110 (filed March 7, 2008).

following modifications to the presumptions and general rules relied upon in calculating pole attachment rates under the telecommunications formula:

i. Allocate the communications worker safety zone space to common (i.e., "unusable") space to require communications attachers, whose workers the safety zone was created to protect, to pay for an equal share of the cost of that space.

ii. Lower the presumed numbers of rural and urban attaching entities per pole to two (excluding the utility itself) to reflect actual prevailing conditions.

iii. Do not count the utility as an "attaching entity" in calculating the allocation of common space.

iv. Ensure that space allocation reflects the number of attachments.

v. Clarify that space allocations for special types of attachments must reflect the full amount of space occupied.

D. Rules for determining the number of attaching entities used in the telecom rate should reflect prevailing actual conditions.

The Commission should acknowledge that the record evidence in this proceeding supports lowering the presumptive number of attaching entities to three (including the electric utility) attaching entities for both urban and rural areas. The Commission should accordingly reject NCTA's proposal to establish the presumed number at four attaching entities, which is artificially high and contradicts the evidence, including, in part, NCTA's own comments. The Commission should also reject TW Telecom and Comptel's proposal to limit the rights of electric utilities to rebut the presumed number of attaching entities.

1. Only entities that make "pole attachments" should be counted as an "attaching entities" in calculating the allocation of common space.

The Alliance urges the Commission to reject TW Telecom and Comptel's proposal that the Commission must "reiterate" its rule that, when counting the number of "attaching entities," a utility must count "*all* attaching entities on its poles, including *its own attachments* and attachments by government agencies."[58] Instead, to comport with the text and structure of the statute, the Commission should revise its rules to exclude all entities that are not jurisdictional "pole attachers" within the meaning of section 224. Thus, the Commission should only include attachments made by cable systems and CLECs, not attachments made by ILECs, governmental entities, or by the utility itself.

The Commission's current rule, which defines the term "attaching entity" to include the utility with respect to its own pole, is inconsistent with the plain language of the statutory definition of "pole attachment" as any attachment by "a cable television system or provider of telecommunications services to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[59] Section 224(e)(1) provides that, under the telecom formula, a utility must apportion the cost of the common space (i.e., "space other than usable space") "among entities" so that the apportionment equals two-thirds of the cost that would be allocated "under an equal apportionment of such costs among all attaching entities." Accordingly, the term "attaching entities" should be read as limited to only those entities to which the statutorily mandated allocation "among" entities applies. The statute applies only to those entities that make jurisdictional pole attachments — i.e., cable systems and providers of telecommunications services.

2. TW Telecom and Comptel's proposal to require utilities to count only a subset of poles in the number of "attaching entities" is discriminatory.

TW Telecom and Comptel urges the Commission to require that utilities seeking to rebut the presumed number of attaching entities may include only poles with at least two attachments

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[58] TW Telecom and Comptel Comments at 22.

[59] 47 U.S.C. § 224(a)(4).

and poles on which the attaching entity in question is attached or will be attached.[60] The Commission should reject TW Telecom and Comptel's proposal because it would be impracticable to administer and would result in discriminatory rate differences in violation of section 224(e).

Section 224(e) requires the Commission to "ensure that a utility charges … nondiscriminatory rates." TW Telecom and Comptel ask the Commission to allow the utility's survey to count only "poles on which the attacher has actually placed its facilities or to which an attacher seeks to attach." This proposal would result in a different average number of attaching entities for each and every attaching entity. For example, if a cable company and a CLEC are on the same pole, and each company is attached to a different subset of the pole owner's poles, then the number of attaching entities for each such attacher will be different. The resulting rates for each party will be different, resulting in a discriminatory rate differential in violation of section 224(e).

3. The record evidence supports lowering the presumed number of attaching entities to three (including the electric utility).

As explained below, numerous comments filed by both electric industry and the cable industry parties show that the Commission's existing presumption of five attaching entities per pole in urban areas is substantially higher than prevailing actual averages and should be lowered to comport with such actual averages. These comments also show that, as NCTA's economist Dr. Kravtin notes, "the distinction between rural and urbanized areas is becoming increasingly blurred"[61] and that, as NCTA explains, a single presumed number is simpler to administer, will

[60] TW Telecom and Comptel Comments at 22-23.

[61] NCTA Comments at Attachment A, Report of Patricia D. Kravtin at para. 47. Kravtin adds that "population alone is not necessarily well correlated with the true underlying

likely lead to fewer disputes, and will result in greater uniformity of rates.[62] Accordingly, a single presumed number that accurately reflects prevailing averages should apply to both rural and urban areas.

In its initial comments, the Alliance urged the Commission to change the presumed number of attaching entities (including the utility) to three for both rural and urban areas, which number would better reflect prevailing actual conditions and therefore be more consistent with the statute, which prescribes an allocation of costs "among all attaching entities" — i.e., among the actual number of entities attached to the pole, not among a fictional number of attaching entities that best fits the business plan of a particular attaching entity.

a. Cable and CLEC commenters' arguments that the number of attaching entities is somehow lower than Congress "expected" constitute a collateral attack on Congress's policy judgment and on the plain text of the statute.

Cable and CLEC commenters contend that the number of attaching entities has been lower than Congress expected and this failure of a large number of competitors to materialize has resulted in an "artificially high" telecom rate. The common theme in these comments is essentially that Congress got it wrong, so the Commission should "reinterpret" — or ignore — the statute to thwart congressional intent.[63] For example, Charter Communications grouses that

determinants affecting the number of attaching entities, i.e., density or concentrations of population, commerce, educational, and/or governmental activity." *Id.*

[62] NCTA Comments at 28.

[63] Discontent over the statute as it currently reads is a continuation of a sour-grapes theme sounded by cable commenters in comments filed in response to the 2007 *Notice*. For example, Comcast simply dismissed the telecommunications rate as having been "created … as part of a political compromise" on the basis of expected growth of the CLEC industry, which industry "never developed in that fashion." *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Comments of Comcast Corporation at 19-20 (filed

"[u]nfortunately, [Congress's] predictions did not come to pass."[64] Even if it were true that Congress erred in its policy judgment (which, as explained below, it did not), these comments are out of place in a regulatory proceeding because the Commission has no authority to amend the statute. The Commission should reject these back-door attempts to amend the statute because the Commission has no authority to re-write or disregard the section 224 telecom rate formula language as currently set forth in the statute.

b. The plain text, structure, and legislative history of the statute all show that Congress "got it right" — i.e., expected that the number of attaching entities would result in a higher pole attachment rate than the cable rate.

Charter Communications claims that Congress "expected the telecom rate to fall to approximately the same level as the cable rate" and that, because those predictions "[u]nfortunately" did not come true, "telecom rates always far exceed cable rates."[65] Nowhere does the plain language, structure, or legislative history of the 1996 Act amendments to section

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March 7, 2008). Similarly, the State Cable Associations confirm that "[w]hen the 1996 amendments were passed, it was assumed — incorrectly — that there would be many separate attachers and attachments . . . ." *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Broadband Communications Association of Washington, the Cable Television Association of Georgia, the Cable Telecommunications Association of New York, Inc., the Cable Telecommunications Association of Maryland, Delaware & the District of Columbia, the Missouri Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc., the Oregon Cable Telecommunications Association, the South Carolina Cable Television Association, and the Texas Cable Association at 12-16 (filed March 7, 2008) ("State Cable Assoc. 2007 Notice Comments").

[64] Charter Comments at 5; s*ee also* Comcast Comments at 7 (asserting that Congress wrongly "anticipated" the number of attachers to increase).

[65] Charter Comments at 5; *see also*, Comcast Comments at 7 (asserting that Congress "expected" telecom rates to "decline towards the cable rate as the number of … attachers increased during the ten [sic] year phase-in period.").

224 provides any evidence for this revisionist account of congressional intent. If Congress has intended that the telecom rate turn out at the "same level" as the cable rate, it could have (and, logically, would have) achieved this goal very simply: by applying the existing cable rate to telecommunications carriers.

As explained in the Alliance's initial comments, Congress expressly provides for a phase-in period to slow any *increase* in pole attachment rates as a result of the implementation of the telecom rate.[66] In other words, Congress *expected* an *increase*, not the continuation of the status quo for cable companies that provide telecommunications services. If Charter is correct, it would appear that Congress intended to minimize the increase for telecom providers for a five-year period, by the end of which period, so the reasoning goes, the rate would end up where it started — at the cable rate. It is not clear why Congress would have employed such a convoluted Rube Goldberg scheme to apply, in effect, the cable rate to all pole attachments.

On the contrary, the structure of the rate provisions shows that the telecom rate is necessarily a higher rate than the cable rate. Where the cable rate, even at its "high end," allocates pole costs only on the basis of usable space occupied by the attaching entity, the telecom rate allocates both a proportionate share of the costs of usable space *and* two-thirds of an *equal* share of the costs of common ("other than usable") space. Finally, the legislative history of the 1996 Act amendments to section 224 show that Congress regarded the historic cable rate as a subsidy rate. A House Committee report accompanying legislation that ultimately became the basis of the 1996 Act characterized the cable formula as providing "cable companies a more favorable rate for attachment than other telecommunications service providers," and it made clear that "[t]he beneficial rate to cable companies was established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[67] While Congress intended to provide the more favorable cable rate to an "infant industry," it chose to provide a higher rate for cable companies that have matured to the point of competing in markets for advanced telecommunications services. Congress understood quite well that the telecommunications industry and technology platforms were converging and prepared to compete vigorously without continuing the full subsidy provided by the old cable rate.

c. The record, including commenters' complaints that the number of attaching entities has proven to be "lower than expected," amply demonstrates that the Commission's presumed numbers of attaching entities are too high.

The record show a broad agreement between the electric industry and the cable and CLEC industries on a key factual point: the average number of attaching entities is lower than the Commission postulated when it established presumptive numbers of five for urban areas and three for rural areas. In fact, even as the number, variety, and weight of attachments has increased, the number of "attaching *entities*" per pole has remained well below the presumptive averages used by the Commission in calculating the telecom rate.

Electric Industry Comments. Comments filed by EEI and UTC in this proceeding show averages of three or fewer attaching entities per pole (including the electric utility) in *both* rural and urban areas.[68] Numerous individual electric utilities across the country report similar

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[66] Alliance Comments at 86.

[67] H. Rpt. 104-204 at 91 (emphasis added).

[68] See FNPRM Proceeding, Comments of the Edison Electric Institute and Utilities Telecom Council at 77 (filed August 16, 2010) ("EEI-UTC Comments") (stating that "[u]tilities generally have an average of fewer than three attaching entities per pole on poles with third-party attachments, both in rural and urban areas."). Respondents to the UTC survey reported that 76 percent of their poles in urban areas had three or fewer *attachments,* which means an equal or even lower number of attaching entities. *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC

averages. In many cases, the averages are significantly below three attaching entities per pole. AEP, for example, reports that, among its operating companies in states subject to the Commission's pole attachment jurisdiction, the average number of attaching entities (including the electric utility) ranged from 2.44 for Southwestern Electric Power Company in Arkansas, to 2.67 for Kingsport Power Company, serving the city of Kingsport, Tennessee.[69] Within the Alliance, other examples include Georgia Power (2.85 urban / 2.58 rural),[70] Florida Power &

Docket No. 07-245, RM-11293, RM-11303, Comments of the Edison Electric Institute and Utilities Telecom Council at 46 (filed March 7, 2008). Because each attaching entity on a given pole has at least one attachment on that pole, the average number of attachments represents a maximum figure of how many attaching entities there can be on that pole — i.e., there cannot be a greater number of attaching entities on the pole than there are attachments. In its comments on the 2007 NPRM, EEI states that, for example, CenterPoint Energy, whose entire service area (Houston, Texas) is urban, reports an average of 2.66 attaching entities (including CenterPoint Energy) per pole on poles with third-party attachments, with three or fewer entities on over 90 percent of those poles, and five or more entities on less than one percent. *Id.*

[69] In calculating this average number, AEP included only joint use poles, defined as any pole with at least one third-party attacher. Each average number includes the electric utility itself. Significantly, this number assumes perfect overlap of joint users, which means that the actual number may be even lower. For example, if a utility knows that it has 100,000 poles that have an ILEC attachment, and 90,000 poles that have a CATV attachment, and 15,000 poles that have one or more CLEC attachment, it is assumed that no fewer than 90,000 of the 100,000 ILEC-attached poles also has a CATV, and, in turn, that no fewer than 15,000 of those 90,000 poles also has a CLEC attachment. In reality, there may be some poles that have CATV attachments, but no ILEC attachments, or some poles that have CLEC attachments, but no CATV attachments, and so on. The significance of this point is that the total number of joint use poles is higher than the number stated above and, as a result, the average number of attaching entities is, in reality, even lower than what is stated above.

[70] Southern Company's largest operating company subsidiary (in terms of customers served), Georgia Power, serves Fulton County, which has the second highest population of any Georgia county, and is the center of metropolitan Atlanta. Georgia Power also serves several other major urban areas in Georgia, including Augusta, Macon, Columbus, Rome, and Valdosta. The average number of attaching entities per pole for Georgia Power's entire service territory, including both urban and rural counties, is 2.74, including Georgia Power itself and including only poles with at least one attacher other than Georgia Power. The average number of attaching entities is 2.85 for Georgia Power's urban counties, and 2.58 for rural counties.

Light (significantly fewer than three),[71] and Progress Energy (2.37).[72] Comments filed in response to the Commission's 2007 Notice included similar figures from numerous other electric utilities.[73] Typically, the number of poles that have five attaching entities is almost statistically insignificant, while the number of poles that have only two attaching entities (including the electric utility) represents a substantial share of all poles.[74]

Cable Industry Comments. Cable industry comments fundamentally agree with electric industry comments that the actual number of attaching entities is not what the Commission, for whatever reasons, initially presumed.[75] As explained above, these commenters attempt to pin the

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[71] Florida Power & Light reports a system-wide, estimated average of significantly fewer than three attaching entities, including Florida Power & Light itself. This figure includes only poles that have at least one joint user or other third party attachment.

[72] Including Progress Energy itself, the average system-wide number of attachments per joint use pole is 2.37. Progress Energy does not track the number of "attaching entities" or attaching parties as such, but Progress Energy does track the number of attachments on its distribution poles.

[73] *See, e.g., In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Allegheny Power, Baltimore Gas & Electric, Dayton Power & Light, FirstEnergy Corp., Kansas City Power & Light, National Grid, and NSTAR at 13-18 (filed March 7, 2008) (showing averages of far fewer than three attaching entities per pole and specifically illustrating that very few poles have more than three attaching entities).

[74] For example, AEP reports that, in the city of Kingsport, Tennessee, there are a total of only 51 poles with five attaching entities each, out of 23,043 poles that have at least one third-party attacher (i.e., 0.15 percent of the total).

[75] See, e.g., *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Charter Communications at 9 (filed March 7, 2008) (stating that the telecom rate "formula was set in 1996 when Congress expected many new competing facilities-based providers under the federal and state laws then opening up the local exchange market. … Had new entrants proliferated and succeeded, the "telecom" formula would have produced a rate quite similar to the cable rate. But instead, the CLEC market collapsed, and the technology changed from one involving more attached lines to that of integrated IP-enabled broadband networks that carry video, Internet access, and voice on one line that occupy no more space and add no new burden . . . ."); Comcast Comments at i (stating that "[w]hen Congress adopted the telecommunications pole formula in 1996, competing facilities-based

"blame" for the telecom rate on Congress. As explained above, Congress in fact correctly anticipated a telecom rate that would be higher than the cable rate. The significance of these Cable industry comments is that they recognize that the actual number of attaching entities is in fact lower than the Commission's presumed numbers.

d. The Alliance agrees with NCTA that the Commission should adopt a single presumed number of attaching entities that is lower than the current presumed number for urban areas but NCTA's requested number (four) is unrealistically high.

Cable and CLEC claims that the number of attaching entities has proven to be lower than expected simply illustrates that the Commission's presumed number of 5 attaching entities in urban areas is too high and that a new, lower, presumptive number is needed. Rather than ignoring the statute, the Commission should lower the presumed number of attaching entities to make it consistent with the statute. The Alliance agrees with NCTA that, for purposes of calculating the telecom rate, "the number of presumed attaching entities should be adjusted to

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telecommunications carriers were expected to proliferate as the pro-competitive policies of the Act took effect over the ten [sic] year phase-in for the new rate. However, the large number of competing telecommunications lines did not develop — both because of fierce ILEC opposition and because of the unanticipated development of a more efficient technology (cable VoIP) which did not require the attachment of additional lines to poles."); NCTA Comments at 13 and 28 (referencing "a very large number of attaching entities, a condition that was expected but did not emerge at the time the Telecom Act was enacted" and confirming that "the market has failed to deliver the large number of attaching entities anticipated when the Telecom Act was adopted . . . ."); Time Warner Cable Comments at n. 12 (citation omitted) (agreeing with the New York Commission that "the number of attachers has not developed as previously contemplated . . . ."); Bright House Comments at 24 (stating that "[i]n practice the current telecom service rate formula usually yields rates considerably higher than the cable service rate due to the lower than anticipated number of authorized attachers on the pole."); and State Cable Assoc. 2007 Notice Comments at 16 (confirming that "[w]hen the 1996 amendments were passed, it was assumed — incorrectly — that there would be many separate attachers and attachments . . . . As it has turned out, additional services — whether VoIP or circuit-switched — have not been provided over large numbers of new attachments on each pole, but over existing attachments.").

reflect today's marketplace realities."[76] NCTA's comments on this issue are significant because NCTA's members would presumably benefit from a higher presumed number of attaching entities. Recognizing the "realities" in the field today, however, NCTA surprisingly urges the Commission to adopt a presumed number that is *lower* than the current presumptive number for urban areas (five). For the reasons set forth below, NCTA's suggestion to change the presumption (for all areas) to four attaching entities per pole is still unrealistically high and should be rejected. Nevertheless, in light of the fact that there is little difference between urban and rural areas, the Alliance agrees with NCTA that "[a] single presumptive figure is less complex to administer and will likely lead to fewer disputes in the field."[77] A single presumed number, as NCTA states, "provides consistency and uniformity in rates, and serves to level the competitive playing field, all of which will promote broadband deployment, consistent with the National Broadband Plan's objectives."[78]

As explained above and in numerous comments by both the electric and cable industries, the reality in today's "marketplace" is that prevailing actual number of attaching entities is three or fewer on both urban and rural poles. Contrary to the overwhelming majority of evidence in the record, NCTA argues for a "compromise" figure of four attaching entities. NCTA reasons that the number of attaching entities, although not as high as expected, is nevertheless "growing" enough to justify a presumption of four attaching entities per pole.[79] NCTA cites three developments in support of this proposition, but none provides a valid basis for presuming four attachments in the face of empirical evidence that the average is, in fact, three or fewer.

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[76] NCTA Comments at 21.

[77] *Id.* at 28.

[78] *Id.*

First, NCTA claims that "[f]iber backbone providers such as Fibertech" are attaching to utility poles. This "trend" must be put into perspective. The number of CLEC attachments typically represents a tiny percentage of all communications attachments on an electric utility's poles. For example, Entergy Corp., Progress Energy, and Duke Energy all report that fewer than one percent of all communications attachments on their pole are CLEC attachments. Thus, the statistical impact of an increase in the number of CLECs is not particularly significant. Also, in most cases, the baseline is fewer than three attaching entities. Thus, a number of additional fiber attachers may simply be rounding out the Alliance's recommended presumptive number of three attaching entities per pole (assuming the utility is counted). Finally, in at least some cases, old systems of attachments are removed from the pole, which cancels out part or all of the increase due to the addition of new systems.

Second, NCTA cites the fact that "distributed antenna service providers such as NextG, Extanet, and American Tower" are also attaching to utility poles as evidence of a growing number of attaching entities.[80] The growing number of DAS and other wireless antennas on electric utility poles does not represent a substantial increase in the number of attaching entities per pole on average for one simple reason: wireless antennas are attached to only a relatively small number of poles. As the FNPRM acknowledges, "wireless carriers using a distributed antenna system (DAS) attach to relatively few poles compared to cable operators and wireline carriers that attach to every pole that their network passes."[81] Confirming the Commission's observation, CTIA explains in its initial comments on the FNPRM that

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[79] *Id.*

[80] *Id.*

[81] FNPRM at para. 53.

> systemwide DAS build-out is inherently a smaller-scale project than wireline build-out; unlike wireline build-outs, wireless build-outs do not require attachments on each and every pole. This means that whereas the average wireline networks can include hundreds of thousands of poles, DAS networks only include dozens of poles — or hundreds at the high end of the scale.[82]

Third, NCTA states that "NTIA and RUS have been given grant money to build broadband systems in unserved and underserved areas, many of which are necessarily located in rural areas."[83] This fact supposedly contributes to the allegedly growing number of attaching entities on poles owned by utilities subject to the Commission's pole attachment jurisdiction. NCTA fails to acknowledge that this point is almost entirely irrelevant because the vast majority of NTIA and RUS loans have been given either to entities that have no rights under section 224 or for systems that are deployed on poles owned by electric cooperatives or other non-investor-owned pole owners that are not subject to the Commission's section 224 jurisdiction. As NCTA acknowledges, "RUS loans are only made available for projects in rural areas."[84] Such areas are predominantly served by entities that are excluded from the definition of "utility" under section 224.

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[82] CTIA Comments at 7, *citing* NextG Networks, Philadelphia Pennsylvania Case Study, http://www.nextgnetworks.net/communities/philadelphia.html (last visited July 30, 2010) (describing the deployment of a 400-plus node system that covers more than 100 square miles in Philadelphia, PA; *see, e.g.*, FNPRM Proceeding, Comments of MetroPCS Communications, Inc. at 13 (filed August 16, 2010) ("MetroPCS Comments") (stating that "DAS providers attach to relatively few poles, while wired providers attach to every pole along a given route."); FNPRM Proceeding, Comments of NextG Networks, Inc. at 18 ("NextG Comments") (stating that "a relatively few number [sic] of poles are typically submitted when entities request wireless attachment. NextG's wireless equipment requests are typically only seven percent (7%) of the total permit applications.").

[83] NCTA Comments at 28.

[84] *Id.*

Even if NCTA's prediction were to come true some day, the Commission's presumption should be based on facts, not forecasts. The Commission chose an expected number when it first established the presumption, but the expectation was not realized. This time, the Commission should choose a number that reflects today's actual conditions, not what the conditions might be in the future.

E. The Commission Should Continue to Address Rates for Wireless Attachments on a Case-Specific Basis.

The Alliance urges the Commission to continue addressing rates for wireless attachments on a case-specific basis due to the complexity and variability of wireless equipment and the varying amount of space occupied by such equipment. To the extent the Commission chooses to address wireless attachments in this proceeding, it should proceed with special caution. Specifically, the Commission should ensure that: (1) only those wireless attachments that are subject to the Commission's section 224 jurisdiction are deemed eligible for a regulated pole attachment rate; and (2) any framework for applying the telecom rate formula to wireless attachments must take into account the total space actually occupied by wireless attachments, regardless of whether such use "displaces" other existing or potential attachers.

1. In view of the complexity of wireless attachments, the Commission should continue to treat wireless rates on a case-specific basis.

Several wireless commenters urge the Commission to adopt "the same" telecom rate to wireless attachments as to wireline attachments. The Alliance opposes standardized rates for wireless attachments, due to the fact that wireless attachments are uniquely complex and involve varying amounts of space occupied. Rates should account for these variables. The Commission has previously recognized the complexities involved and has deliberately decided to "not adopt separate or detailed regulations" for considering complaints about wireless attachment rates.[85] No circumstances have changed that would justify moving to a standard rate. On the contrary, the size, weight, shape, and safety hazards of wireless attachments are more variable than ever before, and their placement on poles raises more complex issues for developing a rate. In some cases, negotiated rates include not only a fee for pole access, but also for electric power service for wireless antennas and associated equipment.[86] In view of these growing complexities, the Commission should continue to allow utilities and wireless providers to develop rates for wireless attachments on a case-specific basis.

2. Only jurisdictional wireless attachments are eligible for regulated rates under section 224.

Several wireless industry commenters in this proceeding seek regulated rates for all wireless attachments, but they do not clarify whether all such attachments are in fact subject to the Commission's pole attachment jurisdiction under section 224. Section 224 covers only "pole attachment[s]," defined as an attachment "by a cable television system or provider of telecommunications services." Accordingly, the Commission's pole attachment regulations do not apply to attachments by entities that are neither cable television systems nor providers of telecommunications services. For example, an entity that provides only internet service (whether wireless or otherwise) has no rights under section 224. A statutory change would be required to enable the Commission to extend a regulated rate formula to cover any such non-jurisdictional attachments.

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[85] *See* Telecom Order at paras. 117-121 and n. 390; *see also,* 2001 Reconsideration Order at paras. 43-45.

[86] For example, for wireless attachments that require electricity, AEP charges a negotiated, blended rate that includes both a pole rental fee and an unmetered rate for electric power service.

The Alliance therefore urges the Commission to clarify: (1) that any wireless attachment rate formula it may adopt would apply only to entities that fall within the only two categories that qualify for regulated rate treatment under section 224, namely cable television systems and providers of telecommunications services; and (2) more specifically, attachments used for information service only (such as attachments by stand-alone wireless information service providers) are not eligible for a regulated rate under section 224.

3. Telecom rate calculations for wireless attachment must account for actual space occupied by wireless antennas and associated equipment regardless of whether other attachers are "displaced."

The DAS Forum asks the Commission to "confirm" that wireless is subject to the telecom rate.[87] Similarly, NextG urges the Commission to adopt "same regulated rate formula" for wireless as for wireline attachments.[88] To the extent that DAS is asking the Commission to transplant the one-size-fits-all framework of its existing telecom rate formula for wireline attachments, the Commission should reject the DAS Forum's request. The Alliance urges the Commission to clarify that, to the extent a wireless attachment might otherwise qualify for the statutory telecom rate, the Commission's presumption of one foot of space occupied not apply to wireless attachments. As the DAS Forum correctly concedes, wireless attachments "may require more than one foot of usable space."[89] The DAS Forum is also correct to point out that the rate should be calculated "by how much space is used."[90] Taking the DAS Forum at its word, the space factor used in calculating the telecom rate for a wireless attachment should correspond to the *actual space occupied by the attached item*.

[87] DAS Forum Comments at 21.

[88] NextG Comments at 24.

[89] DAS Forum Comments at 23.

a. Space occupied by an attachment means space used by that attachment regardless of whether it "displaces" another attachment.

Actual space required includes space on any portion of the pole where the item of wireless equipment is attached, including both the "usable" space and the common space. If, for example, a wireless antenna or associated equipment box, cable, or riser is vertically attached to any portion of the pole, the rate should reflect the full extent of the space occupied or used by the item in question.

CTIA urges the Commission to exclude any space used where such space is already also used by another attacher. CTIA specifically asks the Commission to redefine "usable space" to mean only where the wireless attachment prevents others from using the same space; a vertical attachment should count only where it displaces another.[91] CTIA's proposal is contrary to the plain language of the statute. Section 224(e)(3) specifies that the amount of space occupied is the "percentage of usable space required for each entity."[92] The Commission has never suggested that a wireless attacher — or any attaching entity — should receive rent-free space where such space is concurrently occupied by another attaching entity. On the contrary, with regard to wireless attachments specifically, the Commission has only stated that the statutory pole rental rate is "based on the space occupied by the attachment and the number of attaching

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[90] *Id.* at 15.

[91] CTIA Comments at 17.

[92] It should be noted that the statutory term is "required," not "occupied." The rate is calculated with reference to what is required by the attaching entity. The attaching entity need not occupy, i.e., take possession of the space to the exclusion of others, in order to require a certain amount of space to achieve its commercial and technical purposes as an attaching entity. Black's Law Dictionary defines "occupant" as "one who has possessory rights in, or control over, certain property or premises." BLACKS LAW DICTIONARY (9th Ed.) at 1184. The attaching entity does not — certainly not exclusively — possess or control the space it requires for its attachment.

entities on the pole, together with reasonable make-ready fees."[93] The Commission has thus always been well aware that there are a "number of attaching entities" on the same pole, but has nevertheless consistently acknowledged that the wireless attacher must nevertheless pay for the space it uses.

b. CTIA's proposed "displacement-only" rule would be discriminatory in violation of section 224(e).

CTIA's proposal to allow utilities to charge for space used by a wireless attacher only where such space is not already used by another attacher would presumably mean that wireless attachers would be permitted to use for free any portion of the pole that is also used by an existing attacher. In other words, such existing attacher would pay for most or all of the costs of the space occupied by both attachments. The result would be two different rates — i.e., rate discrimination, which clearly violates the requirement of section 224(e) that rates must be nondiscriminatory.

II. MAKE-READY AND ACCESS

A. Make-Ready Timeline

1. The Commission should not adopt specific timelines.

As the Alliance made clear in its initial comments, the Commission lacks statutory authority to impose a make-ready timeline, and it would be an arbitrary and capricious departure from its well-established case-specific approach to attempt to do so in this proceeding. As proposed in the Alliance's initial comments, the Commission should reaffirm its established practice in light of the fact that make-ready has become even *more* complex and variable than it was when the Commission adopted its case-by-case approach in its orders implementing the

[93] Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles

1996 Act amendments to section 224. The Alliance questions whether there is any need for a make-ready timeline. Significantly, the initial comments of major segments of the telecommunications industry show little enthusiasm for the timeline proposal. For example, the ILECs, who themselves are aggressively seeking attachment rights under section 224, do not express any need for a make-ready timeline support the proposed timeline — on the contrary, they uniformly oppose any such timeline on sound policy grounds. Also noteworthy, the major cable industry commenters are mostly silent, tepid, or hostile with regard to the Commission's proposed make-ready timeline, despite their obvious interest in pole attachment access and speed to market for new services. Comcast, Charter, and Bright House say nothing at all about the make-ready timelines.[94] NCTA and Comcast relegate their faint praise for the timeline to vague footnote references.[95]

Several broadband providers — each of whom has a strong interest in timely access to electric utility poles — make a compelling case that "specific timelines are unwise, and the proposed timeline is unrealistic."[96] Time Warner Cable attacks the FNPRM's proposed multi-

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At Reasonable Rates, DA-04-4046, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004).

[94] Charter discusses timeframes for dispute resolution, but says nothing about make-ready timelines. *See* Charter Comments at 22-23.

[95] NCTA cites a need to "expedite infrastructure access," but is silent on make-ready timelines except for a single reference (in a footnote) to "timeframes for pole owner action at each stage of attachment" as one item in a series of seven FNPRM proposals it "supports." NCTA Comments at 40, n. 128. Comcast likewise relegates its assessment of the make-ready timeline to a footnote, as an item in a series. Comcast Comments at 3, n. 5 (vaguely referencing "a new application/make-ready timeline"). The "exception that proves the rule" is the American Cable Association, the only cable commenter to express support for the Commission's proposal outside of a footnote. *See* American Cable Association Comments at 7-8.

[96] FNPRM Proceeding, Comments of CenturyLink at 30 (filed August 16, 2010) ("CenturyLink Comments").

stage timeline, stating that it is "ill-advised and would prove counter productive in practice."[97] The Alliance agrees with Time Warner Cable that, "[w]hile contracting parties are free to negotiate additional time for any required make-ready, the reality is that most utilities, pursuant to private contract terms or course of performance, allow attachment and complete necessary make-ready in far less time than the Commission proposes here."[98] As Verizon notes, and as the record in this proceeding otherwise amply demonstrates, there are multiple variables outside the control of pole owners that have an impact on the completion of make ready work.[99] As CenturyLink explains, there are "many delays beyond a pole owner's control" such as permitting requirements, weather delays, and delays created by prospective attachers.[100] The Alliance agrees with these comments.

The Commission has previously recognized these difficulties and, instead of prescribing rigid timelines, has regulated pole access on a case-specific basis. The Commission has held that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[101] The Alliance agrees with Verizon that there have been no changes to these facts that would justify a change in the Commission's current guideline approach for make ready work completion.[102]

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[97] Time Warner Cable Comments at ii and 15-16. Time Warner Cable only adds that, "[i]f the Commission decides to set permitting and make-ready timetables," the timelines should be shorter. *Id.*

[98] Time Warner Cable Comments at 16.

[99] FNPRM Proceeding, Comments of Verizon at 28 (filed August 16, 2010) ("Verizon Comments").

[100] CenturyLink Comments at 30.

[101] Local Competition Order at para. 1143.

[102] Verizon Comments at 29 (*citing* Local Competition Order at para. 1143).

2. Any timeline should allow for varying circumstances.

In the event that the Commission nevertheless chooses to impose a make-ready timeline and assuming, *arguendo*, that it has the authority to do so, the Alliance agrees with AT&T that such a timeline "has to be subject to a rule of reasonableness" because the issues that could naturally arise and delay the pole attachment process cannot be predicted by the Commission, utilities, or potential attachers.[103] The Alliance also agrees with AT&T that, at a minimum, circumstances that may justify "stopping the clock" should include an incomplete request, non-payment or a large request.[104] There is no getting around the reality that the make-ready process is fact-specific. As discussed above, the best way to address that reality is not to adopt specific timelines. However, if the Commission adopts timelines in spite of its lack of statutory authority to do so, such timelines need to be flexible and specifically allow for exceptions in order to accommodate the fact-specific nature of the make-ready process.

3. The proposed timeline is already unrealistically short and should not be made even shorter.

Comments alleging that the make-ready timeline proposed in the FNPRM is too long should be rejected, because, as explained in the Alliance's initial comments, the proposed deadline is already unrealistically short, lacks a statutory basis, and would be a radical departure from Commission precedent.[105] Specifically, the Commission should reject Time Warner Cable's proposal that, if the Commission insists on adopting a make-ready timeline, it should

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[103] FNPRM Proceeding, Comments of AT&T Inc. at 28 (filed August 16, 2010) ("AT&T Comments").

[104] *See id.* at 28.

[105] Alliance Comments 25-49.

adopt a shorter timeline for smaller numbers of poles.[106] Time Warner Cable argues that its proposal should be adopted because under current rules, pole owners have 45 days to "grant access" to poles, and most "run-of-the-mill" attachments can be installed in less time.[107] As explained in the Alliance's initial comments, the amount of time required for make-ready is not simply a function of the number of poles involved.[108] Any "cookie cutter" approach based on a specific number of poles fails to take into account the fact-specific nature of make-ready. In the varying context of make-ready, there is no such thing as a "run-of-the-mill" attachment.

Even a request involving a relatively small number of poles typically requires an engineering analysis to ensure safety and reliability and multi-party coordination to ensure the timely rearrangement of existing attachments. Such a request may also involve complicating factors requiring more time than the unrealistically short deadlines proposed by Time Warner Cable. Time Warner Cable proposes far shorter deadlines than are proposed in the FNPRM and makes no allowance for either ordinary circumstance (e.g., multi-party coordination) or other circumstances beyond the control of the utility.[109] Time Warner Cable's proposal should, therefore, be rejected.

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[106] As noted above, Time Warner Cable opposes the Commission's proposed timeline.

[107] Time Warner Cable Comments at 16. It should be noted that the rule does not require the utility to complete make-ready or otherwise "grant access" within 45 days. The rule only requires the utility to confirm a denial of access in writing by the 45th day. *See Id.*, *citing* 47 C.F.R. § 1.1403(b) ("If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th days.").

[108] Alliance Comments at 18.

[109] Specifically, Time Warner Cable asks the Commission to adopt a 45-day timeline for requests to attach to between 20 and 200 poles, a 30-day timeline for fewer than 20 poles, and somewhere between 60 and 90 days for requests for attachments on greater than 200 poles. Time Warner Cable Comments at 18. Time Warner Cable's proposal makes no allowance for multi-party coordination or other common circumstances that would require additional time, even for requests involving smaller numbers of poles. *Id.*

4. No timeline should apply to negotiation of master agreements.

The Commission should reject proposals to establish a timeline for negotiation of a master agreement.[110] As explained in the Alliance's initial comments, the Commission lacks statutory authority to impose a one-size-fits-all timeline on make-ready, and no such timeline can reasonably account for the fact-intensive nature of make-ready.[111] For the same reasons, the Commission should not impose a timeline on the negotiation of master agreements. Additionally, the statute and the Commission's regulations already provide a sufficient remedy for delays in negotiating a master agreement. Specifically a prospective attacher can file a complaint against the utility and can make a fact-specific case that a delay in negotiating a master agreement is unjust and unreasonable. A fixed timeline for negotiating the master agreement would create an arbitrary presumption that the utility is imposing an unjust and unreasonable rate, term, or condition on attachments, when, in fact, delays in negotiations may be caused by the prospective attacher. For these reasons, the Commission should not adopt a timeline for negotiating a master agreement and should continue to address disputes over such negotiations on a case-by-case basis.

5. No timeline should apply to pole replacement.

The Commission should reject requests to include pole replacement in the timeline.[112] The FNPRM correctly incorporates the Coalition of Concerned Utilities' request to exclude from

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[110] For example, DAS Forum proposes a 90-day timeline for completion of a master agreement for wireless attachment access. DAS Forum Comments at 17-18.

[111] Alliance Comments at 25-49.

[112] DAS Forum, for example, specifically requests a 30-day deadline for pole replacement. DAS Forum Comments at 19.

this timeline pole replacement and attachment of wireless equipment.[113] In any event, the Commission has no authority to impose a timeline requirement on pole replacements because, as the FNPRM acknowledges, utilities have no obligation to increase capacity by replacing poles.[114] It would also be impracticable to include pole replacements in a prescribed timeline because. As the FNPRM notes, "pole replacement may take significantly longer than make-ready on existing poles."[115] The time needed to replace a specific pole or series of poles can also vary for many reasons. Electric utilities do not typically purchase their poles at the local lumber yard, and poles that must meet region-specific specifications often must be specially ordered. For example, Progress Energy reports that poles deployed in areas subject to storm warnings must be of non-standard heights and thicknesses. Similarly, poles needed to support specific types of attachments, such as DAS nodes, often must be taller or thicker, thus potentially also requiring a special order. Furthermore, in the wake of a major storm incident, even poles of average specifications (as well as the crews needed to install such poles) are in short supply, necessitating additional time for replacement.

6. No timeline should apply to wireless attachment requests.

The Commission should reject wireless industry proposals to apply a timeline to requests

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[113] FNPRM at para. 32.

[114] *Id.* at para. 36 (stating that "[w]e note that the Eleventh Circuit has held that utilities are not obligated by statute to replace poles that are full to capacity.").

[115] FNPRM at para. 36, *citing* SegTEL Comments at 4, *citing* Exhibit A. Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Maine Public Utilities Commission, Order, Docket No. 2005-486 (Oct. 26, 2006); Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Maine Public Utilities Commission, Order on Reconsideration, Docket No. 2005-486 (Feb. 28, 2007) (contrasting Maine's 180-day timeframe when poles must be replaced with Maine's 90-day timeframe for make-ready without pole replacement).

for wireless attachments.[116] The Commission prudently excludes the attachment of wireless equipment from its proposed make-ready timeline.[117] As explained in the Alliance's initial comments, make-ready is even more complex and fact-specific today than it was when the Commission first established its case-specific approach to resolving make-ready disputes.[118] The complexity and variability of make-ready is even greater in the case of wireless attachments, due to the size, number, and variety of wireless equipment attachments as well as associated safety issues unique to RF-emitting wireless nodes.

One commenter requests that wireless attachments be subject to a *shorter* timeline, claiming that, if 90 days is sufficient for collocation of wireless equipment on towers and other structures other than electric distribution poles (as the Commission concluded in its recent "shot clock" ruling), then 148 days is too long.[119] The analogy is inapt because collocation of wireless antennas on such structures is a different enterprise altogether from attachments on distribution poles. Towers are often specifically designed and constructed for the purpose of hosting wireless antennas and other communications attachments. Electric utility poles are, by contrast, built for the purpose of supplying electricity by wire.

In the Commission's declaratory ruling, the central issues in determining a "reasonable" period of time in which a state or local government must allow collocation of wireless equipment pertained to public zoning processes. For example, the ruling discusses whether the addition an

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[116] DAS and MetroPCS propose to apply the same timeline to wireless as proposed for wireline in the FNPRM. *See* DAS Forum Comments at 20; MetroPCS Comments at 11-12.

[117] FNPRM at para. 32.

[118] Alliance Comments at 44-45.

[119] CTIA Comments at 7-8, *citing In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under*

antenna constituted a significant increase in the size of the tower, thereby triggering additional hearings or other procedural requirements.[120] There is no discussion in the declaratory ruling of rearrangement of existing attachments, safety and reliability, or other fact-specific types of issues that are central to determining whether a make-ready timeline for installation of wireless attachments on distribution poles would be workable or, if so, what period of time would be reasonable.

B. Staged Payment

The Commission should reject proposals that attachers would allow attachers "to pay utilities for make-ready work in stages and to withhold a portion of the payment until work is completed."[121] An electric utility is not a bank and should not be compelled to provide financing services to attaching entities. Many electric utilities companies properly require payment of 100 percent of make-ready charges in advance. The primary reason for this policy is simple: the utility has no assurance that it will be able to collect the balance due for make-ready work after such work is completed. Electric utilities are also subject to State regulations that can further complicate — or preclude altogether — any such scheme for payment of make-ready "on layaway."

Section 253 State and local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165m Declaratory Ruling at para. 45 (2009).

[120] *In the Matter of Petition for Declaratory Ruling To Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling at paras. 43-48, FCC 09-99 (2009) (for example "[i]n particular, some applications may reasonably require additional time to explore collaborative solutions among the governments, wireless providers, and affected communities. Also, State and local governments may sometimes need additional time to prepare a written explanation of their decisions as required by Section 332(c)(7)(B)(iii), and the timeframes as proposed may not accommodate reasonable, generally applicable procedural requirements in some communities.").

[121] TW Telecom and Comptel Comments at 15.

1. A requirement for staged payment would be unjust and unreasonable.

The Alliance member companies' experience in this matter is the same as that of the Coalition of Concerned Utilities: "Attachers too often lose contracts for new business, change routes, go out of business, change ownership, or experience other difficulties that cause make-ready costs to remain unpaid long after the work has been completed."[122] In light of these contingencies, it would be unreasonable to expect an electric utility to bear the risk of whether an attaching entity is going to follow through on its business plan. Likewise, it would be unjust and unreasonable for the Commission to require electric utilities to act as "the bank" or otherwise allow attaching entities to "float" any portion of make-ready charges. Under the just and reasonable standard, the agency must take into account the interest of investors.[123] In applying the just and reasonable standard, therefore, the Commission is obliged to consider the interests of investors in investor-owned utilities ("IOUs"). IOU investors reasonably expect to receive a worthwhile return on their investment. These investors invest in a regulated industry whose mission is to construct electric power facilities using investor capital in order to sell electricity to customers at regulated rates. A regulatory scheme whereby the utility is required to assume the risks of collection and forego the time value of money is, by definition, not fully compensatory and therefore inconsistent with IOU investors' reasonable expectations.

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[122] FNPRM Proceeding, Comments of the Coalition of Concerned Utilities at 77 (filed August 16, 2010) ("Coalition Comments").

[123] *FPC v. Hope Nat. Gas Co.,* 320 U.S. 591, 603 (1944) (finding that "the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests.").

2. Staged payment must not apply to collections pursuant to any multi-party make-ready payments under the "clearinghouse" proposal.

As explained in the Alliance's initial comments, the Commission has no authority to adopt the FNPRM's proposed "clearinghouse" rule.[124] The proposal would require utilities to administer reimbursements by new applicants of rearrangement expenses incurred by existing attachers to make room for such new applicants. If the Commission, despite its lack of statutory authority to do so, adopts both the clearinghouse rule and the staged payment rule, it should clarify that the staged payment rule does not apply to such clearinghouse payments made through the utility. Electric utilities, if compelled to act as "the bank," should not then be left "holding the bag" in the event an applicant fails to reimburse an existing attaching entity for the full amount of its expenses associated with rearrangement or transfer. Specifically, the Commission should clarify that the electric utility has no obligation to indemnify or make whole the existing attacher in the event an applicant fails to submit to the utility the full amount owed to the existing attacher plus a reasonable fee owed to the utility. The Commission should also clarify that, in the event an applicant fails to pay in full up-front in a single payment, the electric utility is entitled to deduct its fee from whatever amount is received and has no follow-up obligation to bill the applicant or to enforce collection of any additional amount due by such applicant to the existing attacher.

C. The Commission should reject proposals to require model agreements or allow attachers to opt-in to existing joint use and pole attachment agreements.

The Alliance urges the Commission to reject commenters' proposals to allow attachers to opt-in to existing joint use and pole attachment agreements. Specifically, Verizon argues that

[124] Alliance Comments at 54-60.

communications attachers should be able to "opt in" to existing pole agreements, which would require pole owners to make each agreement publicly available.[125] Verizon contends that allowing entities to opt in would aid negotiations and allow parties to obtain "more reasonable attachment rates."[126] Further, Verizon indicates that if negotiations are not successful, opting in would allow entities to "terminate the existing joint use or joint ownership agreement" and opt in to a pole attachment agreement.[127] Similarly, TW Telecom and Comptel suggest that utilities should be required to post model pole attachment agreements.[128] TW Telecom and Comptel incorrectly assert that a model agreement is needed to "curb utilities' ability to act on their incentive to impose illegal or unreasonable terms and conditions on attachers and to expedite pole attachment negotiations and dispute resolution."[129]

1. Section 224 provides for negotiation of individual agreements by the parties.

Proposals to impose a model agreement or to allow an attaching party to opt in to an existing agreement are contrary to the text, structure, and legislative history of section 224, as well as to Commission precedent that has found that case-by-case negotiation of such agreements is necessary, because the terms and conditions are inherently fact-specific. Verizon acknowledges this fact in its request for the adoption of an opt-in rule, when it notes that there are practical limitations to its proposal because certain agreements would not be appropriate for

[125] Verizon Comments at 20-21.

[126] *Id.* at 20.

[127] *Id.*

[128] TW Telecom and Comptel Comments at 19-21.

[129] *Id.* at 19.

certain types of attachers.[130]

The Commission should reject these suggestions because they are contrary to the very idea of a negotiated agreement which is the most effective way to address pole attachment rates terms and conditions. The FNPRM acknowledges that negotiated agreements are the "quickest and least burdensome way for parties to resolve disputed terms of access." [131] As the Alliance explained in its initial comments,[132] negotiated agreements should be the norm, and uniform timelines and other mandates should not be adopted, as they can "short-circuit" negotiation and lead to more disputes. Parties should be free to negotiate rates, terms and conditions that effectively address the situation at hand, rather than being forced to use predetermined models or relying on prior agreements that would have to be modified to fit the parties to the negotiation. It would also be inappropriate to consider individual terms and conditions of pole attachment agreements outside of their context.

2. ILECs cannot "opt in" to pole attachment agreements because the Commission has no jurisdiction over ILEC attachments.

If the Commission were to adopt some sort of opt-in scheme (which it should not), such scheme could not apply with respect to joint use agreements between electric utilities and ILECs. As explained in section V of these reply comments, the Commission has no jurisdiction over attachments made by ILECs on electric utility poles and *a fortiori* no jurisdiction over the joint use agreements that govern such attachments. Thus, ILECs would

[130] Verizon Comments at 20 ("There are … practical limitations with this proposal. For example, it would not be feasible for an ordinary attacher to 'opt in' to a joint ownership agreement that is predicated on both parties having an ownership interest in each pole. … Nor would it be feasible for an ordinary attacher to 'opt in' to a joint use agreement that is predicated on each party owning some fixed number of poles in a geographic area….").

[131] FNPRM at para. 23.

[132] Alliance Comments at 10.

have no rights to opt in to any jurisdictional pole attachment agreements. Correspondingly, because ILEC-electric joint use agreements are not subject to the Commission's pole attachment jurisdiction, no cable company or CLEC could opt into any such joint use agreement. For these reasons, if the Commission insists on providing for an opt-in arrangement, it should clarify that ILEC-electric joint use agreements are excluded.

3. Proposals to "opt-in" to existing pole attachment agreements are not analogous to Commission opt-in rules for interconnection.

The Commission's opt-in rules for interconnection are based on a specific statutory authorization in section 252(i), which requires local exchange carriers to provide interconnection "upon the same terms and conditions" as those provided under an existing agreement "approved under this section."[133] There is no analogous language in section 224. In the first place, section 224 provides only for review of rates, terms, and conditions in the event of a dispute — it makes no provision for pre-filing or Commission "approval" of pole attachment agreements. Also, section 224 does not require that terms and conditions be "the same," but only "just and reasonable." As explained in these comments, the Commission has always evaluated terms and conditions on a case-specific basis.

Section 224 is ill-suited to an opt-in or standard-agreement approach. On the contrary, as explained above, the plain text, structure, and legislative history of section 224 require the Commission to allow the parties to individually negotiate attachment agreements. It should further be noted that the Commission's interconnection rules place numerous restrictions on interconnection opt-ins that are inconsistent with the proposals cited above. For example, the "all or nothing rule" forbids an opting-in party from "picking and choosing" provisions of

[133] 47 U.S.C. § 252(i).

contracts. Other restrictions include cost comparability, technical feasibility, and the "reasonable time" requirement.[134]

D. Outside Contractors

1. The Commission should reject proposals to allow non-electric-qualified workers to work among the electric power lines.

The Commission should reject proposals to allow access to the power supply space by communications workers who are not qualified to work "among" the power lines. As explained in the Alliance's initial comments, the FNPRM's proposal to allow non-electric-qualified workers to work in the electric power supply space is not sufficiently restrictive to protect safety and reliability of electric infrastructure.[135] The utility should be allowed to determine when or whether to allow properly qualified contract workers to work within the electric supply space. Any proposal to mandate access to the power space by non-qualified workers is contrary to OSHA regulations and renders meaningless the utility's right to deny access for reasons of safety and reliability under section 224(f)(2).

a. Mandated access to the power space by non-electric-qualified workers violates OSHA requirements.

The FNPRM correctly clarifies that "[n]othing we propose … supplants or modifies regulations by … OSHA."[136] OSHA regulations require extensive training for all workers working on or near electric distribution facilities. The Commission should, therefore, reject any proposal to allow workers who are not specifically electric-qualified to work among the power

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[134] *Global NAPS, Inc. v. FCC*, 291 F.3d 832 (2002).

[135] Alliance Comments at 63-65.

[136] FNPRM at para. 24, citing Local Competition Order, 11 FCC Rcd at 16071-72, paras. 1151-52. The FNPRM also notes that its *Reconsideration Order* specifically acknowledged that "utilities' requirements with respect to qualifications and training of individuals working in

lines. Qualifications and training for personnel working in close proximity to electric facilities are pervasively regulated by OSHA.[137] Such regulations include work "on or directly associated with" electric "distribution lines and equipment."[138] Electric utilities are required to ensure that all personnel performing such work receive extensive training in safety-related work practices.[139] OSHA interpretive rules have clarified that such regulations apply to workers "who are not electrical workers but whose work activity would require exposure to electrical hazards associated with the … distribution of electric power." This restriction clearly encompasses communications workers who are working on or near electric distributions facilities such as poles. The Commission should, therefore, reject any proposal to allow non-electric qualified workers to enter the power space.

b. The utility has the right to deny access to unqualified workers.

Section 224(f)(2) gives the utility the right to "deny a cable television system or any telecommunications carrier access to its poles … on a nondiscriminatory basis … for reasons of safety …." Access by a cable or telecommunications worker to work "among the power lines" certainly constitutes "access" to the utility's poles. Failure to comply with applicable OSHA safety standards or other utility-specific safety standards is a nondiscriminatory criterion for denying access on the basis of safety. Accordingly, any requirement to allow non-electric-

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proximity to utility facilities flow from such codes and requirements as … OSHA ... ." Local Competition Reconsideration Order, 14 FCC Rcd at 18079, para. 87.

[137] *See generally* 29 C.F.R. § 1910.269 (setting forth OSHA standard for "Electric Power Generation, Transmission, and Distribution").

[138] 29 C.F.R. § 1910.269(a)(1)(i).

[139] 29 C.F.R. § 1910.269(a)(2)(i). For example, qualified workers must have training in the "use of special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on *or near* exposed energized parts of electric equipment." (Emphasis added).

qualified workers in the power space would render meaningless the utility's right to deny access under section 224(f)(2).

2. The Commission should allow electric utilities to determine whether third-party contractors are qualified to work in the power supply space.

Regarding approval and certification of contract workers, the FNPRM proposes a more restrictive standard for electric utility pole owners than for ILEC pole owners. Specifically, the FNPRM would allow electric utilities to pre-approve the contractors they will permit to perform surveys and make-ready.[140] By contrast, the FNPRM proposes that, on ILEC poles, attachers be allowed to use any contractor that has the same qualifications as the utility's own workers. TW Telecom and Comptel assert that the "adoption of a more restrictive standard for the selection and use of third-party contractors on electrical utilities' poles does not make sense."[141] In TW Telecom's and Comptel's lengthy discourse of the relative "bargaining power" of ILECs and electric utilities, the reader seeks in vain for any recognition by TW Telecom and Comptel that there are serious reasons of safety and reliability for restricting access to the power space.

Instead of requiring electric utilities to liberalize access to the power space on their poles in line with the proposed standard for access to ILEC poles, the Alliance urges the Commission to do the opposite: apply the same, equally restrictive standard as applies to electric poles to ILEC poles that have attached electric power facilities. More specifically, the electric utility that owns the electric facilities, either on the electric utility's own pole or on the ILEC's pole, should have the exclusive right to determine whether a contractor is qualified to enter the power space. Electricity is electricity whether the electric facilities are attached to an IOU-owned pole or an

[140] FNPRM at para. 62.

[141] TW Telecom and Comptel Comments at 14.

ILEC-owned pole. The experience of the Alliance companies confirms that power space access granted by ILEC pole owners to insufficiently qualified workers can cause, and has indeed caused, serious safety and reliability hazards, including more than one recent case of where ILEC line contractors set poles in the primary supply space and caught the poles on fire.[142] In light of such experience, the Commission is absolutely correct to conclude that "[c]rucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and we find the utilities' concerns reasonable."[143] Accordingly, the Commission should: (1) apply the same standard to electric power supply space access on any pole to which electric distribution facilities are attached; and (2) clarify that the electric utility should be the arbiter for access qualifications with respect to all such poles on which its own facilities are attached, regardless of whether the pole is owned by the electric utility itself or an ILEC.

E. Pole Top Access

The Commission should reject proposals by several wireless commenters to "confirm" that there is an essentially unlimited right of pole-top access[144] — because neither the statute nor Commission precedent provides such a right. The wireless commenters argue that the pole top is "usable space" and that, therefore, somehow utilities are obliged to allow access to their pole tops. The issue of whether the pole top is usable space is irrelevant in determining the extent of the wireless attacher's right (if any) to attach to the pole top.[145] Instead, the determinative issue

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[142] For example, Progress Energy reports two recent cases in which errors made by non-electric-qualified contractors working in the vicinity of electric wires on ILEC-owned poles directly resulted in poles catching on fire.

[143] FNPRM at para. 61.

[144] *See, e.g.,* DAS Forum Comments at 12.

[145] DAS cites the section 224(d)(2) definition of "usable space" as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated

in this matter is safety. As even the wireless commenters acknowledge, section 224(f)(2) gives the utility the right to deny access to its poles on a nondiscriminatory basis for reasons of, *inter alia*, safety.[146] The pole top is in the power supply space and, therefore, unquestionably involves safety issues. DAS cites several provisions of the National Electric *Safety* Code ("NESC") relating to communications antenna attachments, and these citations only further illustrate that pole-top access is, in fact, a serious safety issue requiring detailed treatment in the NESC.

The Commission has never established a presumption in favor of pole-top access. Instead, the Commission has only declined to establish a presumption against pole-top access and has instead left the issue to the "merits of any individual case,"[147] consistent with its case-specific approach to access and safety issues otherwise. More importantly, the Commission has specifically recognized that the "limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: 'where there is insufficient capacity, or for reasons of safety, reliability, or generally applicable engineering purposes.'"[148]

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equipment." It should be noted that section 224(d)(2) expressly applies only "[a]s used in this subsection" (i.e., in subsection 224(d) relating to the cable rate), and therefore does not necessarily control the meaning of the term "usable space" in 224(e). If Congress had intended the specific definition of usable space in section 224(d) to apply to the calculation of the telecom rate under section 224(e), it could have easily done so.

[146] See DAS Comments at 15 (conceding that a utility "can … deny access to requested usable space (including the pole top) 'on a nondiscriminatory basis where there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes.'").

[147] *Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates*, DA-04-4046, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004) (noting that "we take no position on the merits of any individual case" and declining to establish a presumption that space above the communications space may be "reserved for utility use only").

[148] *Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates*, DA-04-4046, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004).

F. The proposed attachment database would be ineffective and susceptible to abuse by unauthorized attachers.

As explained in the Alliance's initial comments, the Commission has no statutory authority to compel electric utilities to establish and maintain a database of pole capacity and location information.[149] The Alliance also agrees with several telecommunications industry commenters that such a database would be ineffective, extremely costly, and virtually impossible to maintain. As Verizon cautions, publication of such data would not "meaningfully improve the process for accessing poles" because it could create a "significant risk" that entities would use the information to circumvent the application process and create an incentive to place unauthorized pole attachments.[150] The Alliance also agrees with CenturyLink that the proposed database would not be effective because "there are an estimated 134 million utility poles in the United States, and an untold number of other facilities supporting the provision of broadband network" and that the FNPRM incorrectly assumes that there are detailed records for such pole facilities on a nationwide basis.[151] CenturyLink confirms that there are "huge" challenges to creating such a database and notes that there data availability and quality issues, as well as security issues that are raised by such a proposal.[152] As CenturyLink also explains, the costs of such a database would far outweigh the benefits to attachers.[153] For these reasons, the Alliance

[149] Alliance Comments at 65-67.

[150] Verizon Comments at 41.

[151] CenturyLink Comments at 33. As CenturyLink also explains, the costs of such a database would far outweigh the benefits to attachers: "[a]ny plan to utilize poles, ducts, conduits, or rights of way requires inspection of those facilities to confirm the accuracy of the data, assess the condition of the facility, estimate the cost of any make-ready work, and determine the appropriate technique for attachment." CenturyLink Comments at 34.

[152] *Id.*

[153] *Id.* at 34 ("[a]ny plan to utilize poles, ducts, conduits, or rights of way requires inspection of those facilities to confirm the accuracy of the data, assess the condition of the

agrees with Verizon and CenturyLink that the Commission should not adopt such a database or other reporting or disclosure requirements.

III. THE FNPRM'S COMPENSATORY DAMAGES PROPOSAL IS NOT CONSISTENT WITH COMMISSION PRECEDENT.

As explained in the Alliance's initial comments,[154] the Commission has no authority to award compensatory damages to attachers in pole attachment proceedings. TW Telecom and Comptel and Time Warner Cable claim that the Commission has already held that "compensatory damages are available" to attaching entities under section 224.[155] They specifically cite four cases in support of this claim: *Knology Inc. v. Georgia Power Co.* ("*Knology*"),[156] *Cable Tex., Inc. v. Entergy Services, Inc.* ("*Cable Tex.*"),[157] *Salsgiver v. North Pittsburgh Telephone Company* ("*Salsgiver*"),[158] and *Mile Hi Cable v. Public Service Co. of Colorado* ("*Mile Hi Cable*").[159] None of these cases support the commenters' proposal for compensatory damages.

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facility, estimate the cost of any make-ready work, and determine the appropriate technique for attachment").

[154] Alliance Comments at 69-72. As explained in more detail in the Alliance's comments, the Commission does not have the authority to assess compensatory damages because (1) section 224 provides no authority to "make whole" or otherwise "compensate" an attaching entity with respect to lost business opportunities or increased expenses the attacher might incur; (2) any "compensation" extracted from the utility apart from proper scope of "just and reasonable" standard would be a confiscation of the utility's property in violation of the 5th Amendment; and (3) the proposed rule, as applied to electric utilities, contradicts the Commission's own factual findings, it is arbitrary and capricious. *Id.*

[155] TW Telecom and Comptel Comments at 18 (*citing,* FNPRM at paras. 99-100 and *Salsgiver Communications v. North Pittsburg Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536 at para. 28 (2007)); *see also* Time Warner Cable Comments at 26.

[156] 18 FCC Rcd. 24615 (2003).

[157] 14 FCC Rcd. 6647 (Cable Servs. Bur. 1999).

[158] 22 FCC Rcd. 20536 (2007).

[159] 15 FCC Rcd. 11450 (Cab. Servs. Bur. 2000).

Time Warner Cable asserts that compensatory damages awards are both "consistent with Commission precedent, and, frankly, long overdue."[160] How something that is already available as a matter of precedent can be "overdue" is not specified, but the "overdue" comment is consistent with the fact that the two cases Time Warner cites — whether intentionally or negligently — in support of its precedent claim *do not even mention compensatory damages*: *Knology* and *Cable Tex*. These two cases stand for nothing other than the proposition that the Commission has authority to order refunds under certain circumstances.[161] A refund is nothing but the difference between the rate charged and the rate the Commission deems to be just and reasonable. If "compensatory damages" means nothing but a refund in this sense, the FNPRM presumably would not have proposed to create a new compensatory damages remedy.

TW Telecom and Comptel claim that the Commission has "already held that compensatory damages are available" in *Salsgiver* and *Mile Hi Cable*.[162] However, neither *Salsgiver* nor *Mile Hi Cable* addresses the issue of whether the *Commission* can award compensatory damages to attachers. Instead, it references the ability of the *utility* to seek compensatory damages for unauthorized attachments pursuant to a contractual provision.[163] The

[160] Time Warner Cable Comments at 26.

[161] Both cases allowed refunds to be calculated from a date somewhat earlier than the complaint filing date — a far cry from authorizing compensatory damages in the sense proposed in the FNPRM. See *Knology* at para. 57 and *Cable Tex, Inc. v. Entergy Serv., Inc.*, 14 FCC Rcd. 6647, 6653, paras. 18-19 (Cable Serv. Bur. 1999).

[162] TW Telecom and Comptel Comments at 18 (*citing,* FNPRM at paras. 99-100 and *Salsgiver Communications v. North Pittsburg Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536 at para. 28 (2007)).

[163] In *Salsgiver*, the Commission states: "In *Mile Hi Cable Partners,* the Commission applied general contract principles prohibiting the enforcement of unreasonable penalties for breach of contract, and limited the utility to compensatory damages, where there was no specific record to support punitive damages. Similarly, here we find that it would be unreasonable for NPTC to charge a $250 per attachment penalty, above and beyond compensatory damages,

utility in each of those cases was not asking the Commission to award damages; it was simply trying to enforce the unauthorized attachment provision in its own attachment agreement. *This case obviously has absolutely nothing to do with the question of whether the Commission is authorized to award compensatory damages to attachers.*

Because the precedents cited provide no support for the Commission's compensatory damages proposal, the Alliance submits that the compensatory damages proposal should be rejected.

IV. THE COMMISSION HAS NO AUTHORITY TO "FORBEAR" FROM APPLYING THE TELECOM RATE.

The FNPRM asks whether the Commission may, under section 10 of the Communications Act, "forbear from applying the Section 224(e) telecom rate, and adopt a different rate — such as the cable rate — pursuant to Section 224(b)." The Alliance agrees with the National Rural Electric Cooperative Association ("NRECA") that the answer to this question is "no."[164] For the following reasons, the Commission has no authority to use section 10 to re-regulate section 224 pole attachment rates.

A. The Commission cannot "forbear" from applying section 224(e) because section 10 delegates legislative power to the FCC in violation of the Constitution.

The Commission cannot "forbear" from applying section 224(e) because section 10 on its face violates the U.S. Constitution. Any attempt by the Commission to use section 10 to deprive electric utility pole owners of their section 224 rights to apply the telecom rate to

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without a specific basis to justify such charges. . . . NPTC also fails to explain how the charge is anything but punitive. We therefore direct NPTC, within 60 days, to amend the Pole Attachment Agreement to limit the penalty for unauthorized attachments to compensatory damages, in accordance with *Mile Hi Cable Partners*." *Salsgiver* at para. 28.

telecommunications carriers is likely to result in a constitutional challenge which would deprive the Commission of the use of its presumed section 10 authority *for any purpose*. As the Supreme Court states in *Whitman v. American Trucking Associations, Inc.*,[165] the Constitution permits no delegation of legislative powers.[166] Accordingly, when Congress confers decision-making authority upon agencies Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[167]

The courts have rarely struck down statutes on delegation grounds. However, the uniquely nebulous nature of section 10 raises a serious question about whether the language of the statute provides a sufficient "intelligible principle for applying the specific provision in question" to avoid an impermissible delegation of congressional authority.[168]

Although section 10 provides certain criteria that would arguably be constitutionally sufficient *if* they were part of a specific regulatory provision, these standards do not suffice to justify suppression of Congress's express intent in "*any* provision of this Act." Section 10 is unique in at least three respects. First, section 10 is not itself a specific regulatory provision at all. It is, rather, in effect, a radical rule of construction whereby the Commission can ignore or suppress the plain meaning of specific regulatory provisions in the Communications Act.

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[164] FNPRM Proceeding, Comments of the National Rural Electric Cooperative Association at 31 (filed August 16, 2010) ("NRECA Comments").

[165] 531 U.S. 457 (2001).

[166] *Id.* at 531 U.S. 472, *citing* Art. I, § 1 ("[a]ll legislative Powers herein granted ... in a Congress of the United States.").

[167] *Id.* at 531 U.S. 472 (2001) *citing J. W. Hampton, Jr., & Co. v. US*, 276 U.S. 394, 409 (1928).

[168] The Supreme Court's nondelegation precedents address challenges to specific statutory provisions to regulate, not provisions purporting to allow an agency not to regulate where Congress has specifically directed it to regulate.

Second, section 10 provides no intelligible principle for *implementing* any specific regulatory provision in the Communications Act. At most, it provides a *carte blanche* for *not* implementing *any* provision of the *entire* Communications Act that applies to telecommunications carriers. It is, in effect, an authorization to repeal an act of Congress — either entirely or in any particular respect[169] — or to amend such act so as to substantially alter its scope and effect.

Third, section 10 itself provides no intelligible principle that specifically applies to any of the provisions from which the Commission might choose to forbear. Its broad standards simply trump whatever standards are already included in the provision which the Commission seeks to forbear from applying. To forbear from enforcing a provision, the Commission need only find that the provision is no longer "necessary" to ensure that a regulation is "just and reasonable and not unjustly or unreasonably discriminatory" and that such forbearance is "consistent with the public interest," taking "competitive effects" into consideration.[170] Such standards are typical of specific ratemaking provisions and have been upheld in the context of such provisions. However, it is not clear what those standards mean when applied to other provisions which themselves already have broad provisions. At most, the link between the standards set forth in section 10 and whatever standards are in the underlying provision is a sort of crude "multiplication" of one set of general principles (in section 10) by another, underlying, set of general principles (in the specific provision forborne). The notion of an intelligible principle is thus either carried beyond the breaking point or the only thing intelligible is the notion that

[169] If the Commission is authorized to forbear from applying "any provision of this Act," can it forbear from applying section 10 itself where the requirements of section 10 might otherwise dictate forbearance?

[170] 47 U.S.C. § 160(a).

"anything goes." For these reasons, the Commission should "forbear" from using section 10 to suppress the rights of electric utilities under section 224.

B. Section 10 does not apply to pole attachments on electric utility poles because electric utilities are not "telecommunications carriers" and pole attachments are not "telecommunications service."

The FNPRM asks "to what extent would the Commission be forbearing from the application of a regulation or statutory provision 'to a telecommunications carrier or telecommunications service or a class thereof?'"[171] The Alliance agrees with NRECA that "[t]he telecommunications pole attachment rate provisions of section 224(e) apply to rates charged by 'utilities,' *not* 'telecommunications carriers' or 'telecommunications services,' and impose pole attachment rate regulations on 'utilities,' *not* 'telecommunications carriers' or 'telecommunications services.'"[172] Section 10 authorizes the Commission to forbear only with respect to regulations or statutory provisions that apply to a "telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services."[173] As NRECA explains, section 224 applies only to rates charged by utilities. Accordingly, section 10(a) does not apply to pole attachment rates.

NCTA claims that "Section 224 is 'a provision of this Act' that applies 'to telecommunications carriers' and therefore it is a permissible subject of forbearance."[174] NCTA is wrong. As the Commission has repeatedly acknowledged, if the regulated entity is not a telecommunications carrier, the Commission cannot forbear from applying the applicable

[171] *Id.*

[172] NRECA Comments at 31-32, *citing* 47 U.S.C. § 160(b).

[173] 47 U.S.C. § 160(a).

[174] NCTA Comments at 36.

statutory provision.[175] Under section 224(e), the regulated entity is the utility.[176] Electric utilities are not telecommunications carriers for purposes of section 224 (or, generally speaking, at all). Accordingly, the Commission has no authority to forbear from the application of a statutory provision to an electric utility.

Also, section 224(e) does not apply to any "telecommunications service." The "service" regulated under section 224 is the provision of space on poles for purposes of making pole attachments, not telecommunications services.[177] The fact that the provision applies to pole attachments that happen to be used by providers of telecommunications services is secondary to the service in question. The fact that a telecommunications service provider is using the pole attachment does not make the utility's provision of pole space a telecommunications service, any

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[175] *See, e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5920, para. 53 (2007) ("Although section 10 specifically requires the Commission to override Section 332's application of common carrier regulations to CMRS providers if it determines that a three-part test is satisfied, this mandate applies only to telecommunications carriers and telecommunications services. Thus, if a non-telecommunications provider of mobile wireless broadband Internet access service is deemed a CMRS provider, we would not be authorized by section 10 to forbear from applying any applicable common carrier regulations to that provider."); *Forbearance from Applying Provisions of the Communications Act To Wireless Telecommunications Carriers*, WT Docket No. 98-100, First Report and Order, 15 FCC Rcd 17414, 17427, para. 28 (2000) (holding that "the three-prong [section 10] forbearance test is inapplicable to UTC's request because the Commission lacks forbearance authority over non-common carriers such as UTC," where UTC had sought modification of Commission rules "to allow private microwave licensees to act as providers to other carriers").

[176] Section 224(e) directs the Commission to prescribe regulations to "ensure that a *utility* charges just, reasonable, and nondiscriminatory rates for pole attachments." (Emphasis added). 47 U.S.C. § 224(e).

[177] *National Cable and Telecommunications Association v. Gulf Power, Co.*, 534 U.S. 327, at 338 (2002). Section 224(e) applies to "the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e). The term "pole attachment," in turn, means "any attachment … to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* at § 224(a)(4). Provision of pole space is not a telecommunications service. The regulation is of pole attachment charges, not of telecommunications services.

more than provision of pole space to cable companies is a cable service. Accordingly, the Commission has no authority to forbear from applying section 224(e).

C. Section 10 does not authorize the Commission to forbear from "enforcing" a pole attachment rate against an attaching entity because an enforcement action under section 224 is only against a utility.

NCTA claims, wrongly, that section 224 "applies" to telecommunications carriers and that section 224 is therefore a permissible subject of section 10 forbearance. Section 224 applies to telecommunications carriers, NCTA reasons, because the section 224(e) rate is applied to electric utility pole attachment rates in disputes with telecommunications carriers. Under section 10, the term "applying" refers only to the entity against which the provision is enforced — not the party the provision is intended to benefit or protect. Specifically, section 10 provides that the Commission shall forbear from applying a provision only if the Commission determines that "enforcement of such regulation or provision is not necessary" to ensure just and reasonable rates and that "enforcement of such regulation or provision is not necessary for the protection of consumers …."[178] The scope of the term "applying" thus is limited by the term "enforcement." To forbear from "applying" means to forbear from "enforcing" the provision. To enforce is to enforce against a regulated entity.[179] The section 224(e) rate formula can only be enforced

[178] 47 U.S.C. § 160(a) (emphasis added). See also 47 U.S.C. § 160(b) (directing the Commission to consider whether "forbearance from *enforcing*" the provision or regulation will promote competition) (emphasis added).

[179] FCC "enforcement" occurs only where a regulated entity fails to comply with an applicable provision or regulation. *See* 47 U.S.C. § 401 ("If any person fails or neglects to obey any order of the Commission … the Commission or any party injured thereby … may apply to the appropriate district court of the United States for the *enforcement* of such order. If, after hearing, that court determines that … the person is in disobedience of the same, the court shall enforce obedience to such order ….").

against the pole owner; it is not enforced against the attaching entity.[180] Accordingly, in the limited sense in which the term "applying" is used in section 10, section 224 does not apply to any party other than the utility. Where the utility is not a telecommunications carrier (as is the case with electric utilities), the Commission has no authority to forbear from applying a provision of section 224.

In the FNPRM, the Commission does not "determine" that "enforcement" of section 224(e) is no longer necessary to meet the specified standards and it is not proposing to stop "enforcing" section 224(e). Instead, the Commission finds that the section 224(e) telecom rate is too high, and it is proposing to deprive the utility of its right to charge a rate up to the section 224(e) rate by ignoring section 224(e) and enforcing a different rate against the utility instead. To forbear from "enforcement" of section 224(e) could mean only one thing: deregulating attachments used by telecommunications carriers to provide telecommunications services. It is obviously not the Commission's intent to deregulate pole attachment rates for telecommunications carriers.

D. Section 10 does not authorize "re-regulation by forbearance."

Even if section 10 encompassed pole attachment rates under 224 — and it does not — the Commission's forbearance proposal would contradict the basic purpose of section 10: to deregulate. Section 10 of the Communications Act directs the Commission to "*forbear from*

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[180] Section 224(b)(1) provides that "[f]or purposes of *enforcing* any determination resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary …." The Commission's regulations define a "complaint" as a filing by an attaching entity "alleging that it has been denied access … [or] that a rate, term, or condition for a pole attachment is not just and reasonable." 47 C.F.R. § 1.1402(d).

applying any regulation or any provision" of the Communications Act.[181] As the Commission has repeatedly found, forbearance is for *forbearing* (i.e., not regulating), not for regulating by other means.[182] The Commission's goal in this proceeding is to provide for a uniform pole attachment rate as close as possible to the cable rate. One proposal for achieving this goal is to forbear from the statutory telecom rate and "adopt a different rate — such as the cable rate."[183] NCTA argues that "forbearance alone would produce the intended result" because the Commission can, pursuant to its section 224(b) authority, simply adopt a "new rule" to take the place of the statutory telecom rate. Similarly, AT&T suggests that, in order to allow the Commission to "set a broadband telecom rate that is different from the rate derived from [Section 224(e)]" can be achieved by "forbear[ing] from the presumably higher telecom rate…."[184] NCTA and AT&T are wrong.

Congress enacted section 10 to authorize the Commission to advance the policy goals of the Act by deregulation, not re-regulation. As the Commission recently noted in its Forbearance Procedures Order, "Congress found that 'to improve the [1996 Act's] deregulatory nature,' it had to give carriers the ability to compel the Commission to exercise its authority 'to forbear from

[181] 47 U.S.C. § 160(a) (emphasis added).

[182] *See, e.g.*, *In the Matter of Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service, WC Docket No. 05-261*, Memorandum Opinion and Order at para. 7, FCC06-145 (2006) ("Fones4All Order") ("The Fones4All Forbearance Petition seeks to use the section 10 forbearance provision to create new section 251 unbundling obligations — attempting to revisit, in effect, the *Triennial Review Remand Order*'s section 251 unbundling determinations. The Commission cannot … expand section 251 unbundling through section 10 forbearance").

[183] FNPRM at para. 142.

[184] AT&T Comments at 11 and n. 41.

regulating.'"[185] The Alliance agrees with NRECA that the FNPRM's forbearance proposal would "stand Section 10 on its head."[186] As NRECA states, "[t]he Commission may not, under the guise of deregulatory forbearance, construe section 10 to empower it to impose *increased* regulatory oversight, and stricter rate regulation, on anyone, much less on utilities that are not even subject to Section 10."[187]

Significantly, a petition for forbearance asks the Commission to forbear from enforcing a regulation or provision "with respect to that carrier or those carriers."[188] In other words the Commission is requested to forbear from enforcing such requirement against the petitioner, not to forbear from enforcing it against a third party.[189] In the case of a regulated pole attachment rate charged by a utility pole owner, if the Commission were to forbear from enforcing the cost allocation (i.e., telecom rate) language of section 224(e), the result would be that the Commission would no longer enforce section 224(e) against utility pole owners. Section 224 authorizes pole attachers to file complaints regarding rates charged by pole owners. The Commission *enforces* the rate provisions of section 224 *against utility pole owners* by hearing complaints filed by pole attachers against utility pole owners and issuing orders directing such utilities to modify their rates. Consequently, if section 224(e) were no longer enforced, the result

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[185] *In the Matter of Petition to Establish Procedural requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order at para. 5, FCC 09-56 (2009) ("Forbearance Order"), *citing* 141 Cong. Rec. S8069-70 (June 9, 1995) (remarks of Sen. Pressler).

[186] NRECA Comments at 32.

[187] *Id.*

[188] *Id* at § 160(c).

[189] Forbearance Order at para. 20 (stating that "the essential nature of a petition for forbearance is that it is a petition for relief from regulation. The petitioner asks the Commission to forbear from enforcing against it one or more rules or statutory provisions, which the Commission will do if it determines that the petition meets the statutory criteria.").

would be a “regulatory vacuum:” ILECs and electric utilities would be free to charge market-based rates for pole attachments used to provide telecommunications services.[190]

E. Re-regulation by forbearance is no more permissible in a rulemaking proceeding than in a forbearance petition proceeding.

In the Commission’s 2007 decision in response to a petition filed by Core Communications, the Commission denied Core’s request to forbear from access charge provisions “on the ground that further Commission action, in a separate proceeding, would be needed to fill the void created by forbearance.[191] NCTA claims that its “request for forbearance from section 224(e)(2) is distinguishable because it arises in the context of a rulemaking proceeding, not a section 10(c) petition, and therefore the Commission has the ability to forbear from the old rule while adopting a new rule in a single proceeding.”[192] NCTA misses the forest for the trees.

In the case of Commission-initiated forbearance, whether in a rulemaking proceeding or otherwise, the objective of section 10 is to provide for de-regulation of the regulated party — not the replacement of old regulations by new regulations for the benefit of third parties. To the extent section 10 gives the Commission any authority to take “affirmative acts,” such acts must be deregulatory in nature.[193] Clearly, neither the cable commenters nor the Petitioners are asking

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[190] *See* Fones4All Order at para. 9 (stating that “[f]orbearing from the rule that prohibits local circuit switch unbundling would simply create a regulatory vacuum rather than confer any rights upon requesting carriers or obligations upon incumbent LECs.”).

[191] NCTA Comments at 37, *citing Petition of Core Communications, Inc*., Memorandum Opinion and Order, WC Docket No. 06-100, 22 FCC Rcd 14118 (2007).

[192] *Id.*

[193] For example, in *MCI Worldcom, Inc. v. FCC ,* 209 F.3d 760 (DC Cir. 2000), the DC Circuit upheld the Commission’s use of its forbearance authority in its mandatory detariffing order for interexchange services by non-dominant carriers, which not only eliminated enforcement of tariffing requirements under section 203(a), but also required “barring the doors

the Commission to forbear from enforcing the telecom rate against pole-owner ILECs and electric utilities. Likewise, they are not requesting to bar the Commission's door to cable operator filings in the context of complaint proceedings.[194] Instead, what the opposing commenters appear to be arguing is that the Commission can, under the guise of section 10 forbearance, suppress the implementing regulations under one provision so as to impose a different set of regulations that are contrary to that provision. This proposed course of action is neither "forbearance from enforcement" nor "deregulation by forbearance." Instead, it is impermissible "re-regulation by forbearance."

F. Calls for "forbearance" are a collateral attack on the Commission's efforts to establish reasonable parameters for the forbearance process.

NCTA urges the Commission to take an expansive view of its forbearance powers in a novel setting: taking away one set of regulations so that another set of regulations favored by a special interest will take effect by default. This proposal is completely out of touch with the Commission's recent efforts to bring greater transparency, predictability, and order to its regulatory processes, particularly in the case of forbearance. The Commission's Forbearance

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of the FCC to lawyers bearing tariff filings and throwing out extant tariffs." In that case, the Commission did not "detariff" in order to subject the regulated parties to a different tariff. Rather, the point of the order was to eliminate all section 203(a) rate filings. Likewise, the Commission rejected a petition of Core Communications, Inc. for forbearance from sections 251(g) and 254(g) of the Communications Act and implementing rules. In its petition, Core requested that the Commission apply such forbearance to all telecommunications carriers such that, by default, the grant of its petition "would subject these carriers to section 251(b)(5) of the Act for rate setting purposes." The Commission denied Core's petition because, inter alia, "the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g). If the Commission were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime."

[194] *MCI Worldcom, Inc. v. FCC* , 209 F.3d 760, 764 (stating that "nonenforcement is therefore, forbearance, but barring the doors of the FCC to lawyers bearing tariff filings and throwing out extant tariffs, both affirmative acts, are not").

Procedures Order of June 2009 establishes clear and precise requirements for the filing of forbearance petitions, including requirements that the petitioner specify the "scope of relief" the petitioner is seeking from a regulation or provision applicable to the petitioner.[195] Commissioner Copps hailed the order as a remedy for the "the ills of a forbearance process gone awry" and emphasized that the order was "in spirit with the limited purposes for which [the forbearance provision] was designed."[196] Using the Commissions' limited forbearance power to "re-regulate" cable pole attachments would go far beyond the "spirit" and limited purposes of the provision.

G. As anticipated by Congress, cable and other telecommunications service providers now compete in markets for telecommunications services and should, accordingly, be subject to the telecom rate.

The FNPRM seeks comment on whether "circumstances [have] differed from what Congress anticipated in a way that would counsel in favor of forbearance."[197] As the FNPRM acknowledges, the Commission is obliged to show that circumstances are not what Congress anticipated in order to justify forbearing from a statutory provision.[198]

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[195] Forbearance Order at para. 19.

[196] *In the Matter of Petition to Establish Procedural requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Statement of Commissioner Copps, FCC 09-56 (2009) (stating that "changes are good for numerous reasons not the least of which is that they establish reasonable parameters for the forbearance process, promote sounder policy-making, and hopefully provide significant savings of human and financial resources for the Commission, which has expended far too many dollars and hours dealing with matters that should have been dealt with elsewhere or, occasionally, not at all").

[197] FNPRM at n. 384.

[198] *See id. citing e.g., Petition of Ameritech Corporation for Forbearance from Enforcement Of Section 275(c) of the Communications Act of 1934, As Amended*, 15 FCC Rcd 7066, 7070, paras. 8-9 (1999) ("Given Ameritech's failure to present any new or unanticipated circumstance that might have persuaded Congress to adopt an earlier sunset date, it would be inconsistent with the public interest for us to shorten the period during which Ameritech

Circumstances are not different from what Congress anticipated in a way that would justify forbearance. A core purpose of the Telecommunications Act of 1996 was to facilitate entry into telephony markets by non-incumbent entities, including cable systems.[199] As Congress anticipated,[200] cable providers now offer a broad array of telecommunications services, in competition with traditional telephony or other services offered by CLECs.[201]

H. NCTA's and AT&T's resort to a plea for forbearance constitutes an admission that section 224(e) requires the application of the section 224(e) telecom rate to attachments used to provide broadband services.

NCTA's "request for forbearance"[202] consists of asking the Commission to forbear "from applying the current telecom rate formula to broadband attachments by telecommunications carriers and applying the cable rate formula instead."[203] AT&T acknowledges that section 224(e), because it applies without limitation to "attachments used by telecommunications carriers to provide telecommunications services," poses a "conundrum" which can only be resolved by either "*requir[ing]* the Commission to use the present 224(e) telecom rate formula or *allow[ing]* the Commission to use a different formula for pole attachment facilities by telecommunications

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participation in alarm monitoring should be restricted or otherwise upset Congress' judgment on how to promote competitive conditions in the alarm monitoring market").

[199] *See* S. Rep. No. 104-230 at 5 (1996) ("The legislation reforms the regulatory process *to allow competition for local telephone service by cable*, wireless, long distance, and satellite companies, and electric utilities, as well as other entities.") (emphasis added).

[200] *See* VOIP Petition at 18 and n. 59.

[201] *See id.* at 7-11 (providing examples of cable providers offering telecommunication services).

[202] NCTA Comments at 37.

[203] *Id.* at 32-33.

carriers used for commingled services."[204] AT&T specifically suggests forbearance as a means of allowing the Commission to use a different formula.[205]

Such requests or suggestions by Cable and ILEC commenters that the Commission should take the extreme step of suppressing "the present 224(e) telecom rate formula" in favor of a formula they deem more attractive constitutes an admission that 224(e) applies to broadband attachments. If the law were otherwise, there would be no need for the cable commenters to urge the Commission to "forbear" from complying with the plain text of section 224(e).

V. ILECS HAVE NO ATTACHMENT RIGHTS UNDER SECTION 224.

The ILECs brazenly assert that section 224 "unquestionably" provides attachment rights to ILECs. This assertion is simply laughable, considering that the Commission, Congress, the courts, the cable industry, and even the ILECs themselves, have all long understood just the opposite: that ILECs have no attachment rights under section 224. The Commission could not have stated the matter more clearly than it did in the 1998 Telecom Order: "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier … *the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[206] Because ILECs have no such rights, the Commission has never attempted to regulate the rates, terms, and conditions for ILEC attachments on electric utility poles. The FNPRM correctly does not propose to "alter the Commission's current approach to the regulation of pole attachments by

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[204] AT&T Comments at 11.

[205] *Id.* at n. 41.

[206] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) ("1998 Report and Order") (emphasis added).

incumbent LECs"[207] — because the Commission's "current approach," consistent with section 224, is not to regulate ILEC attachments at all.

A. Section 224 expressly excludes ILEC attachments.

The ILECs argue that the FCC has authority to interpret section 224 to provide attachment rights for ILECs and should extend the cable rate to ILEC attachments. In section 224, ILECs are expressly excluded from the definition of the term "telecommunications carrier." Yet the term "pole attachment" is defined as any attachment by a cable system or "provider of telecommunications services."[208] The term "provider of telecommunications services" is not separately defined. The answer to the question of statutory authority over ILEC attachments thus turns on whether, for purposes of section 224, the term "provider of telecommunications service" is the same as the term "telecommunications carrier." If the two terms refer to the same group of entities, the exclusion of ILECs from the first group (telecommunications carriers) entails their exclusion from the second group (providers of telecommunications services).

The ILECs argue that the term "provider of telecommunications service" is broad enough to include ILECs, while only the term "telecommunications carrier" excludes ILECs.[209] The ILECs, however, are wrong. For the reasons discussed below, the two terms refer to the same group of entities. Thus, for purposes of section 224, the exclusion of ILECs from the term "telecommunications carrier" entails the exclusion of ILECs from the synonymous term

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[207] FNPRM at para. 143.

[208] 47 U.S.C. § 224(a)(4).

[209] USTA states that 224(b) "expressly applies to all providers of telecommunications service, without limitation." FNPRM Proceeding, Comments of the United States Telecommunications Association at 5 (filed August 16, 2010 ("USTA Comments"). The question remains, however: what does the term "providers of telecommunications service" mean in the context of section 224?

"provider of telecommunications services." As a result, the rights to regulated rates, terms, conditions, and access under section 224 all apply only to telecommunications carriers; none of these rights apply to ILECs.

As an initial matter, the question of whether the term "telecommunications carrier," as defined by section 224, excludes ILECs is not in dispute.[210] Section 224(a)(5) expressly provides that, "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)."[211] Section 224(f), in turn, provides a right of access to "telecommunications carriers." Thus, it is also beyond dispute that the ILECs do not have a right of access under section 224(f), which the ILECs themselves concede.[212]

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[210] *See, e.g., Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, "Notice of Proposed Rulemaking" at para. 6 (2007) ("NPRM") (stating that "[f]or purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers."). Although USTA bizarrely persists in referring to the language of section 224(a)(5) as the "*purported* exclusion of ILECs from the definition of 'telecommunications carrier'"(emphasis added) even USTA admits that ILECs are in fact excluded from such definition. *See In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, United States Telecom Association Petition for Rulemaking at 5 (filed Oct. 11, 2005) (stating that "Section 224(a)(5) clearly excludes ILECs from the definition of 'telecommunications carrier.'); *In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, Comments of Bellsouth at 7 (filed December 2, 2005) (acknowledging that ILECs are excluded from the statutory definition of "telecommunications carrier"); *In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, Reply Comments of USTA at 3 (filed December 19, 2005) (stating that "[s]imply put, section 224 excludes ILECs from the definition of a "telecommunications carrier").

[211] 47 U.S.C. § 224(a)(5).

[212] 47 U.S.C. § 224(f).

Although newly disputed by the ILECs, the question of whether "telecommunications carrier" and "provider of telecommunications services" are coextensive for purposes of section 224 is readily resolved by examining the plain text and structure of section 224, the plain text and structure of the Communications Act as a whole, and the legislative history of section 224. All three show that the terms "provider of telecommunications service" and "telecommunications carrier" are interchangeable.

1. Congress has addressed the issue directly and has precluded ILECs from obtaining regulated pole attachment rates.

The plain text and structure of section 224, both on its face and in the context of the Communications Act as a whole, demonstrates that the term "telecommunications carrier" is synonymous with the term "provider of telecommunications service," meaning that ILECs therefore are precluded from obtaining regulated pole attachment rates under section 224. The ILECs' arguments focus narrowly on the phrase "provider of telecommunications service" in section 224(a)(4). Specifically, they argue that Congress's use of two different terms in the same statute means that Congress intended that the two terms have different meanings. They admit that ILECs are excluded from the right of access under section 224(f) (which uses the term "telecommunications carrier") but maintain, nonetheless, that ILECs are included in the definition of "pole attachment" (which uses the term "provider of telecommunications services"). Thus, the ILECs want the Commission to believe that the right of access and the right to regulated rates, terms, and conditions of access are somehow severable. However, those arguments ignore the context of section 224 as a whole which demonstrates conclusively that the phrase "provider of telecommunications services" does not encompass ILECs.[213]

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[213] AT&T Comments at 6-7, *citing Russello v. U.S.*, 464 U.S. 16 (1983) (where "Congress includes particular language in one section of a statute but omits it in another section

2. Section 224 treats the terms "telecommunications carrier" and "provider of telecommunications service" as synonymous.

The definition of "pole attachment" in section 224 shows that the section applies to two groups of eligible entities — cable systems and "providers of telecommunications services."[214] It is undisputed that ILECs are not "telecommunications carriers," and a common-sense reading of section 224 shows that the term "providers of telecommunications services" simply means nothing more or less than "telecommunications carriers." The jurisdictional pole attachers under the statute have a right of access as well as rights to regulated rates, terms, and conditions of access. Nothing in section 224 suggests that Congress intended to give a subset of pole attachers (i.e., ILECs) rights to regulated rates, terms, and conditions of access, but not an underlying right of access. Even the ILECs admit that they have no right of access because, under section 224(f), the right of access is provided only to "telecommunications carriers."

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of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Verizon Comments at 10 (stating that "Congress' deliberate use of the broader term 'provider of telecommunications service' in some parts of Section 224 and the narrow term telecommunications carrier' in other parts of Section 224 must be given full force and effect." However, the Supreme Court has consistently recognized that "context is important in the quest for a word's meaning, and that statutory construction . . . is a holistic endeavor," and a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC v. Bradley Nigh, 543 U.S. 50, 60 (2004), see also, McCarthy v. Bronson*, 500 U.S. 136, 139 (1992) (holding that a statute should be interpreted by looking at not only the particular statutory language, but to the design of the statute as a whole and to its object and policy) (*cited in Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order*, 19 FCC Rcd 13494 (2004)). The Commission has applied this "whole act rule" in previous decisions. *See e.g., Applications of Ameritech Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14939-14940 (1999) (stating that "[b]ecause neither the statute nor the legislative history sheds light on how this apparent conflict might be resolved, we must resolve the conflict in a way that makes sense of the statute as a whole.") (internal citation omitted).

[214] 47 U.S.C. § 224(a)(4).

The use of more than one term to describe the universe of eligible entities does not show that there are separate sets of eligible entities for separate purposes under the same provision. EEI, in its comments on the 2007 Notice, conclusively explained this matter as follows:

> First, section 224 uses a variety of terms to generally refer to the same set of eligible entities. If Congress had intended the term "provider of telecommunications service" to have a different meaning it would have used the term in other parts of Section 224 where regulated rates, terms, and conditions are addressed, but the section uses the exact term "provider of telecommunications service" only once. In all other portions of Section 224, Congress uses the term "telecommunications carrier" by itself or in conjunction with such phrases as "provide any telecommunications services" and "provide telecommunications services." This also indicates that Congress intended the terms "telecommunications carrier" and "provider of telecommunications services" to be interchangeable with one another.[215]

For the Commission to interpret the term "telecommunications carrier" more narrowly than "provider of telecommunications services" would lead to the absurd result that ILECs have a right to just and reasonable rates, terms, and conditions for access, but no right of timely access. The Commission's recent Declaratory Ruling rightly assumes that "access to poles … must be timely in order to constitute *just and reasonable* access" and correctly equates "telecommunications carriers" with the universe of entities eligible for just and reasonable rates, terms, and conditions: "Section 224 of the Act requires utilities to provide cable television systems and any telecommunications carrier with nondiscriminatory access to any poles, ducts,

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215 *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Comments of the Edison Electric Institute and Utilities Telecom Council at 115, *citing, e,g*, 47 U.S.C. § 224(d)(3) (applying the cable rate during a transition period to "any telecommunications carrier"); 47 U.S.C. § 224(e)(1) (applying the telecommunications rate to "telecommunications carriers to provide telecommunications services").

conduits, and rights-of-way owned or controlled by it, and instructs the Commission to ensure that the terms and conditions for pole attachments are just and reasonable."[216]

3. The Communications Act as a whole shows that the terms "telecommunications carrier" and "provider of telecommunications service" are interchangeable for purposes of section 224.

Outside of section 224, the terms "telecommunications carrier" and "provider of telecommunications services" could include ILECs. If, however, the two terms are synonymous in general, then the specific exclusion of ILECs from the term "telecommunications carrier" for purposes of section 224 entails the exclusion of ILECs from the term "providers of telecommunications services" within the same section. Section 224(a)(5) expressly provides that, "[f]or purposes of this section, the term 'telecommunications carrier' (*as defined in section 3 of this Act*) does not include any incumbent local exchange carrier …."[217] Section 3, in turn, defines a "telecommunications carrier," in relevant part, as "*any* provider of telecommunications service."[218] Thus, section 3 equates the two terms and thereby confirms the interpretation of section 224 outlined above — that the term "provider of telecommunications service" in section 224(a)(4) is synonymous with "telecommunications carrier" for purposes of establishing the right to regulated pole attachment rates.

Elsewhere in the Communications Act, the terms "telecommunications carrier" and "provider of telecommunications services" (or the plural form "provider*s* of telecommunications

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[216] *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, Declaratory Ruling at para. 17, FCC No. 10-84 (2010) ("Declaratory Ruling") (emphasis added).

[217] 47 U.S.C. § 224(a)(5) (emphasis added).

[218] 47 U.S.C. § 153(44) (stating that "[t]he term '*telecommunications carrier*' means *any provider of telecommunications services* … ." (emphasis added). The term "any" is commonly defined as "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary (2002) definition of "any."

services") are used interchangeably. Section 251 equates the two terms specifically in reference to section 224 pole attachment access.[219] Other sections freely go back and forth between the two terms to refer to the same set of entities.[220]

4. The legislative history of section 224 confirms that ILECs are not entitled to regulated pole attachment rates.

When originally enacted, the Pole Attachments Act of 1978 included two opposite groups of entities: (1) attachers, a group which was, until 1996, limited to "cable television operators;" and (2) pole owners, i.e., "utilities."[221] The term "utility" meant — and still means — both electric and telephone utilities. The provision was intended to facilitate expansion of an "infant" cable television industry and, in 1996, a growing CLEC industry. There was no intention of allowing ILECs to claim pole attachment rights for themselves.

The Telecommunications Act of 1996 did nothing to bridge the inherent divide between attachers and utilities. The 1996 act expanded section 224 to encompass pole attachments by competitors to ILECs, but it did not grant pole attachment rights to ILECs themselves. For

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[219] Section 251 provides that "[e]ach telecommunications carrier has the duty … to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers …." 47 U.S.C. § 251. Within this context, each local exchange carrier has a duty to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." 47 U.S.C. §251(b)(4).

[220] *See, e.g.,* 47 U.S.C. §160 (forbearance) (directing the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services … [upon finding that] such forbearance will enhance competition among providers of telecommunications services."); 47 U.S.C. §254 (universal service) ("All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service" and referencing "telecommunications carriers" in (d) and (e) of the same section).

[221] *See* Cong. Rec. Vol. 23 (1977) at 35006, comments of Rep. Wirth ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.").

example, a Senate report on the legislation stated that the bill "includes revisions to section 224 of the 1934 Act to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment."[222] Prior to the passage of the 1996, "the telephone companies," of course, could only mean the ILECs. Thus, it is clear that Congress intended to provide pole attachment rights to the ILECs' competitors, not to the ILECs themselves.

5. Federal Court decisions have interpreted the 1996 Act to exclude ILECs as entities entitled to regulated rates, terms, and conditions under section 224.

Several U.S. Court of Appeals decisions characterize Congress's rationale for the section 224 amendments in the 1996 Act as the need to grant "telecommunications carriers" rights to utilities' poles at regulated rates.[223] These prior decisions also use terms such as "telecommunications service providers," "telecommunications carriers," "telecommunications companies," and "providers of telecommunications services" interchangeably when referring to telecommunications carriers.[224] These decisions confirm the plain meaning of the statute as excluding ILECs from the scope of entities entitled to the protections of section 224, including the regulated rates established thereunder.

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[222] S. Rpt. 103-367 on S. 1822, Communications Act of 1995, July 24, 1995 (emphasis added).

[223] *See Southern Co. v. FCC*, 293 F.3d 1338 at 1342 n. 1 (11th Cir. 2002) (stating that Congress recognized that the 1996 Act "added telecommunications carriers to the class of entities entitled to regulated rates for pole attachments, and granted them the same access rights given cable companies.").

[224] *See, e.g., Georgia Power Co. v. Teleport Comm. Atlanta, Inc.*, 346 F.3d 1033 at 1036 (11th Cir. 2003) (stating that the 1996 Act extended the FCC's jurisdiction over utility pole attachments to "telecommunications providers" to mandate access to "telecommunications service providers", that access for "telecommunications companies" was a new development in the act, and that the Telecommunications Act "charged [the FCC] with creating a new telecommunications formula to set attachment rates for telecommunications attachers").

6. The Supreme Court's holding in *NCTA v. Gulf* is consistent with the plain-text exclusion of ILECs from section 224 attachment rights.

The ILECs misleadingly argue that the question of whether ILECs have attachment rights under section 224 is somehow resolved by the Supreme Court's holding in *NCTA v. Gulf* and that electric utilities' position is inconsistent with that case. According to Verizon "some parties" argue against inclusion of ILEC attachments within section 224 because the two specific rate formulas set forth in 224(d) and (e) "somehow limit the scope of Section 224(b)'s broad grant of authority to regulate pole attachments."[225] The electric utilities are wrong, Verizon reasons, because "[t]he Supreme Court has already considered and rejected this argument."[226] Verizon does not bother to identify which, if any, commenter actually makes that argument. The Alliance is unaware of any party that has made this argument in addressing the question of whether ILECs have attachment rights under section 224.

NCTA v. Gulf addresses the question of whether a cable system that provides commingled cable and internet services is eligible for regulated rates, terms, and conditions under section 224. The Court held that, even though the cable rate language of section 224(d) applies only to attachments used "solely to provide cable service," the general grant of regulatory authority under 224(b) nevertheless authorizes the Commission to establish regulated rates for "any attachment" by a cable system or provider of telecommunications services. The question of whether ILECs have attachments under section 224 turns on whether "provider of telecommunications services" is the same thing as a "telecommunications carrier." *NCTA v. Gulf* does not address this question. The court in that case said absolutely nothing about whether

[225] Verizon Comments at 8.

[226] *Id.*

ILECs are providers of telecommunications services, does not construe the term "telecommunications carrier," and nowhere even mentions ILECs.

B. To "reinterpret" section 224 to extend attachment rights to ILECs would be an arbitrary and capricious departure from the Commission's well-established policy.

ILEC commenters boldly claim that ILECs are "unquestionably" providers of telecommunications services with attachment rights under section 224.[227] According to numerous past Commission statements, however, ILECs are unquestionably *not* providers of telecommunications services for purposes of section 224.[228] The Commission stated the matter clearly in the 1998 Telecom Order: "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though *the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[229] Furthermore, as explained below, the Commission has consistently and repeatedly stated that ILECs are excluded from section 224 rights and used the terms "telecommunications carrier" and "provider of telecommunications services" interchangeably.

The FNPRM articulates no rational basis for such a radical departure from the Commission's long-standing precedent. On the contrary, the FNPRM states that the Commission does not propose to alter its "current approach to the regulation of pole attachments

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[227] Verizon Comments at 9 (stating that "[a]n incumbent carrier is unquestionably a 'provider of telecommunications service.'"). See also USTA Comments at 13 (asserting that "[t]here can be little doubt" that Congress intended to include ILECs within the meaning of the term "provider of telecommunications services."); AT&T Comments at iv. (claiming that ILECs are "clearly providers of telecommunications services").

[228] However, commenters dismiss the Commission's considered judgment on this question as "initial confusion." *See* Comments of AT&T at 7.

[229] 1998 Report and Order at para. 5 (emphasis added).

by incumbent LECs" — which is not to regulate them at all. For the Commission to now interpret the 1996 Act as including ILECs in the group of entities entitled to regulated pole attachment rate, terms, and conditions under section 224 would be arbitrary and capricious.

1. The Commission's "current approach" to the regulation of ILEC attachments is not to regulate them at all.

The Commission's regulations on pole attachments expressly exclude ILECs. The Commission's pole attachment regulations equate the terms "telecommunications carrier" and "provider of telecommunications services," expressly acknowledge the statutory exclusion of ILECs from the definition of telecommunications carrier, and do not separate the right of access from eligibility for regulated rates, terms, and conditions.[230]

2. The Commission's rulemaking orders have repeatedly and consistently interpreted section 224, as amended by the 1996 Act, as excluding ILECs from the entities entitled to the protections of section 224.

The Commission's orders implementing and interpreting the 1996 Act consistently state that ILECs are excluded from section 224's protections, and equate the terms "telecommunications carriers" and "provider of telecommunications services."[231] For example, the Local Competition Order expressly links regulated rates, terms, and conditions with the right of "access" and emphatically states that ILECs have no attachments rights under section 224:

[230] 47 C.F.R. §§ 1.403(a) and 1.404 (2007); Compare 47 C.F.R. § 1.402(b) with 47 C.F.R. § 1.402(e).

[231] *See* 1996 First Report and Order at paras. 3 and 6; Local Competition Order at para. 1119 (stating that "[f]or purposes of section 224, the term 'telecommunications carrier' excludes any incumbent LEC as that term is defined in section 251(h)"); *In the Matter of Amendment of the Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, "Report and Order" at paras. 4-5, FCC 00-116, 15 FCC Rcd 6453 (2000) ("2000 Report and Order") (stating that the scope of section 224 was expanded by "applying the Cable Formula to rates for pole attachments made by telecommunications carriers" (emphasis added)); 1998 Report and Order at para. 4 (stating that "The 1996 Act amended Section 224 in several important respects. While

> Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or right-of-way of a competing LEC. Indeed, *section 224 does not provide access rights to incumbent LECs*. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, *no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224* or section 251(b)(4).[232]

Similarly, the Consolidated Reconsideration Order states that section 224(a)(5) excludes ILEC pole attachments from the "requirements for just and reasonable rates, terms and conditions."[233]

The Commission has also specifically stated that Congress intended to exclude ILECs from the entities entitled to regulated rates and other protections under section 224. In the 1998 Report and Order the Commission stated that it was consistent with congressional intent to exclude ILECs because "[t]he 1996 Act…specifically excluded incumbent local exchange carriers … from the definition of telecommunications carriers with rights as pole attachers."[234]

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previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well, the 1996 Act amended Section 224 to extend the protections previously afforded only to cable television operators to telecommunications carriers.").

232 Local Competition Order at para. 1231; *see also* Local Competition Order at n. 2830 (stating "[a]s noted above, incumbent LECs are excluded from the definition of 'telecommunications carrier' for purposes of section 224"); and Local Competition Order at n. 2734 (stating that "[a]s noted, a utility's obligations under section 224(f)(1) … do not extend to incumbent LECs which are excluded from the definition of 'telecommunications carriers' under section 224(a)(5).").

233 2001 Reconsideration Order at para. 1.

234 1998 Report and Order at para. 5; *see also* 1998 Report and Order at para. 19 (stating that "Congress … directed that that the cable operator rate …govern pole attachments by a telecommunications carrier"); *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, "Order on Reconsideration" at para. 18, FCC 99-266 (1999) ("Local Competition Reconsideration Order")

Further, the Commission's orders have equated the terms "telecommunications carrier" and "provider of telecommunications service."[235] The Commission's orders implementing the 1996 Act's changes to section 224 have not interpreted the term "telecommunications carrier" to be narrower in scope than the term "provider of telecommunications service."

3. In contexts outside of section 224, the Commission has equated the terms "telecommunications carrier" with "provider of telecommunications services."

Finally, in other contexts outside of section 224, the Commission has concluded that any entity that provides telecommunications services falls within the general definition of "telecommunications carrier" in section 3(44), thereby demonstrating that the terms "provider of telecommunications services" and "telecommunications carrier" are interchangeable.[236]

C. The Alliance agrees with Comcast's 2007 NPRM comments explaining that "ILECs are not protected attachers under section 224."

Comcast's initial comments on the 2007 Notice set forth a forceful and detailed rebuttal of the ILEC's novel argument regarding the scope of section 224. The Alliance agrees with Comcast's comments on this specific issue and hereby incorporates those specific comments by

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(stating that "Congress added telecommunications carriers as beneficiaries of the Commission's oversight of pole attachments").

[235] *See* Implementation Order at para. 7; 1998 Report and Order at para. 19; 2000 Report and Order at para. 5.

[236] In the Local Competition Order's discussion of the interconnection obligations under section 251, the Commission states that "A 'telecommunications carrier' is defined as 'any provider of telecommunications services ….'" Accordingly, the Commission concludes that "to the extent a carrier is engaged in providing for a fee domestic or international telecommunications … the carrier falls within the definition of 'telecommunications carrier.'" Local Competition Order at para. 992. *See also In the Matter of Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, "Memorandum Opinion and Order" at para. 22, 13 FCC Rcd 6293 (1998) (stating that "[a] telecommunications carrier, as defined by the Act, is 'any provider of telecommunications services'….").

reference. (See Attachment 1 for the section of Comcast's comments with the heading "ILECs are Not Protected Attachers Under Section 224"). In particular, the Alliance strongly agrees with Comcast's statement as follows:

> Seizing on the syntactic distinction between "telecommunications carrier" and "provider of telecommunications service," USTelecom asserts that … ILECs are at least entitled to the protections of 224(b)(1) as "providers of telecommunications service." In so doing, USTelecom ignores the plain language of the Pole Attachment Act, its legislative history and Commission precedent.[237]

D. The Alliance agrees with the ILECs' own past statements that they have no attachment rights under section 224.

ILEC comments filed in the pole attachment proceeding leading to the 1998 Report and Order further confirm that ILEC attachments are not entitled to regulated pole attachment rates. In that proceeding the Bell Atlantic Companies ("Bell Atlantic"), SBC Communications, Inc. ("SBC"), Ameritech, and the United States Telephone Association ("USTA") argued that section 224 of the Act specifically excluded ILECs and that ILEC attachments were not included in the definition of "pole attachment" under section 224(a)(4). ILECs and the USTA clearly understood that the terms telecommunications carrier and provider of telecommunications services were interchangeable and that the Commission interpreted section 224 to exclude ILECs from the entities entitled to the regulated rates, terms, and conditions. These entities argued that the ILECs were not attaching entities for purposes of section 224 and that Commission orders had interpreted section 224 to exclude ILECs since they were excluded from the definition of

[237] *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Comcast Corporation at 48-49 (filed March 7, 2008).

telecommunications carriers.[238] Bell Atlantic even argued that a narrow reading of the section 224(a)(5) exclusion would be harmful to ILECs.[239] They also indicated that all utilities should be treated equally under section 224.[240] It took the ILECs a decade to conclude that "there can

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[238] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Bell Atlantic at 5-6 (filed September 26, 1997) ("Bell Atlantic Comments CS Docket No. 97-151") (stating that "the Act defines a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of SBC Communications Inc. at 21 (filed September 26, 1997) ("SBC Comments CS Docket No. 97-151") (arguing that ILECs should not be attaching entities indicating that the NPRM in the proceeding noted "that the definition of 'telecommunications carrier' … excludes ILECs and that 'pole attachment' therefore does not include an ILEC attachment and stating that "the plain language of § 224 precludes ILECs from being treated as attaching entities."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Ameritech at 11 (filed September 26, 1997) ("Ameritech Comments CS Docket No. 97-151") (stating that "[t]he plain language of Section 224(e)(1), coupled with the definition of 'attachment' in Section 224(a)(4) and the exclusion of the ILEC from the definition of 'telecommunications carrier' for purposes of Section 224 requires that ILECs should not be counted as attaching parties.").

[239] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Reply Comments of Bell Atlantic at 21 (filed October 21, 1997). (stating that "[t]hose who urge the Commission to treat ILEC as an attaching entity suggest that the Commission should read narrowly the exclusion of ILECs in Section 224(a)(5) from the definition of a telecommunications provider so as to impose on ILECs all of the burdens of Section 224 but to withhold any of its protections").

[240] *See* Bell Atlantic Comments CS Docket No. 97-151 at 6 (stating that "the Commission may not treat ILECs as attaching entities for purposes of allocating the costs of other than usable space, but not other pole owners such as electric utility companies."); Ameritech Comments CS Docket No. 97-151 at 12 (arguing that "[i]f the electric utility is not included, there is no rational reason to include the ILEC."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of the United States Telephone Association at 12 (filed September 26, 1997) ("USTA Comments CS Docket No. 97-151") (stating that ""if the Commission is going to treat any Section 224-defined utility as an attaching entity, then it should treat all utilities similarly" and "the Commission inappropriately singles out

be little doubt" that ILEC attachments are included in section 224's definition of pole attachment.[241] Yet, for at least two years after the enactment of the 1996 Act amendments to section 224, they had no doubt at all that their attachments were *excluded* from section 224. They were right the first time.

VI. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Alliance for Fair Pole Attachment Rules requests the Federal Communications Commission take action in this proceeding in accordance with the views expressed in these comments.

Respectfully submitted,

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incumbent LECs . . . as attaching entities for purposes of apportioning the costs of the other than usable space, yet does not include electric utilities, or any other type of 224-defined 'utility'").

[241] USTA Comments at 13 (stating that "[t]here can be little doubt that Congress's express decision to use the term 'provider of telecommunications service' in the definition provision of Section 224(a)(5) … was intended to give broader application to the just and reasonable standard of Section 224(b)(1).").

Attachment 1

Excerpt from Comments of Comcast Corporation in response to 2007 Notice of Proposed Rulemaking in WC Docket No. 07-245 arguing that "ILECs are not protected attachers under section 224"

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	WC Docket No. 07-245
	)	

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IX. ILECS ARE NOT PROTECTED ATTACHERS UNDER SECTION 224

a. Section 224 Protects Attachers From Utilities.

The *Notice* inquires whether ILECs are covered by Section 224(a)(4) and (b)(1) of the Pole Attachment Act and, therefore, are able to seek Commission protection for unjust and unreasonable rates, terms and conditions imposed by electric utilities with regard to pole attachments.[158] The Pole Attachment Act clearly and unambiguously excludes ILECs from its protections.

The *Notice* acknowledges that the Pole Attachment Act states "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)" of the Communications Act.[159] Notwithstanding this clear exclusion from Section 224 protections, the petitioner USTelecom claims that ILECs are entitled to just and reasonable rates, terms and conditions as "provider[s] of telecommunications service," under Sections 224(a)(4) and (b)(1), although they are not entitled to access rights as "telecommunications carrier[s]," under Section 224(f).

Seizing on the syntactic distinction between "telecommunications carrier" and "provider of telecommunications service," USTelecom asserts that because Section 224(a)(4) defines "pole attachments" as attachments by "any cable television system or provider of telecommunications service," and because Section 224(b)(1) requires that the "rates, terms and conditions" for "pole attachments" be "just and reasonable," that ILECs are at least entitled to the protections of

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[158] *Notice*, 22 FCC Rcd at 20204-06 ¶¶ 23-25. This issue was raised in a rulemaking petition filed by the United States Telecom Association ("USTelecom"). *Id.* at 20199-200 ¶12.

[159] 47 U.S.C. § 224(a)(5).

224(b)(1) as "providers of telecommunications service." In so doing, USTelecom ignores the plain language of the Pole Attachment Act, its legislative history and Commission precedent.

Specifically, subsection 224(a)(5) incorporates the definition of "telecommunications carrier" from Section 3 of the Communications Act. Under the Communications Act, "[t]he term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services. . . ."[160] Connected by the word "means," the two terms are equivalent, such that one can replace the other. Because the terms are interchangeable, the use of "provider of telecommunications services" rather than "telecommunications carrier" in Section 224(a)(1) is irrelevant: it is a distinction without a difference. Accordingly, "providers of telecommunications services" that are also "incumbent local exchange carriers" under Section 251(h) are excluded from protection as pole attachers.

There are other indicia in Section 224 that ILECs are not included in the classes of attachers intended to be protected. For example:

- Section 224(e)(1) requires the FCC to adopt regulations no later than February 1, 1998 controlling the telecom rate for pole attachments. Section 224(d)(3) applies the cable rate to attachments by cable and telecommunications carriers during the two year period up to February 1, 1998. An ILEC providing telecommunications services falls within neither definition, leaving no statutory authority under which the Commission could adopt a formula to determine such rates.[161]

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[160] 47 U.S.C. § 153(44).

[161] Further, subsection (b)(1) grants the Commission the power generally to "regulate" rates, to hear complaints, and to enforce actions taken in complaint proceedings. *See* Section 224(b)(1). The Commission's authority to adopt a formula to govern the rates charged arises instead from subsections (e)(1) and (e)(4), which direct the Commission to adopt regulations "to govern the charges for pole attachments by telecommunications carriers to provide telecommunications services . . ." and set the effective date as February 8, 2001. *See* Section 224(e)(1), (e)(4). Subsection (b)(1) refers only to "pole attachments," rather than to specific attaching entities; in contrast, subsection (e)(1) refers to "telecommunications carriers," which the ILECs concede they are not, in the context of Section 224. Thus, the only jurisdictional hook the ILECs offer under (b)(1), does not actually allow the Commission to set a formula adopting rates: the Commission could "regulate," but not actually "govern the charges for" pole attachments by ILECs to the poles of other utilities. An interpretation leading to such an absurd result would contravene the

- Section 224(g) would be rendered a nullity. This subsection directs utilities that provide telecommunications or cable services to include, in calculating their costs of service, an "equal amount" to the pole attachment rate "for which such company would be liable" under the Act.[162] If an attachment by a utility constituted a "pole attachment" within the meaning of the Act, this section would be superfluous.[163]

Even if the express language of Section 224 did not so clearly exclude ILECs from coverage, the legislative histories of the 1978 Pole Attachment Act and the 1996 amendments make it abundantly clear that the purpose of Section 224 is to protect attachers from ILECs. As previously explained, the 1978 Pole Attachment Act was passed in order to protect cable television companies from the extensive documented abuses by pole owning utilities, principally ILECs whose anti-competitive tactics have been exhaustively documented.[164] The legislative history of the 1996 amendments reflects an attempt to reconcile Senate and House bills. The alternate use of "telecommunications carrier" and "provider of telecommunications services" in the final version of the legislation as passed simply reflects a stylistic distinction between the drafters of each of the two foundation bills, rather than a substantive difference. Moreover, the Conference Report reconciling the two bills simply makes no reference to this difference in language. Including ILECs within the protections of Section 224 would have warranted some mention by the Congress in light of underlying purposes of the Pole Attachment Act, to protect

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norms of statutory interpretation. *See Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978) (stating "This Court, in interpreting the words of a statute, has 'some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results. . . .'" (internal citations omitted)).

[162] 47 U.S.C. § 224(g).

[163] Under the rules of statutory interpretation, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Blackman v. Dist. of Columbia,* 456 F.3d 167, 177 (D.C. Cir. 2006) (quoting *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)).

[164] *See* pages 8-12, *supra.*

third-party attachers from ILECs and electric utilities.[165] Finally, the Commission has already interpreted these provisions of Section 224 to exclude ILECs.[166]

b. Congress Has Established Utility Joint Ownership Relations at the State Level.

Many states dictate joint ownership relations between ILECs and electric utilities already. For example, in states where the FCC regulates pole attachments, electric and phone utilities are often either required to grant use of their facilities to each other on reasonable terms[167] or must seek prior approval of facility lease agreements with other utilities subject to PSC modification.[168] If ILECs experience issues with electric utility pole owners, there are state-

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[165] The Conference Report does describe other modifications that were made to the Senate version, discussing the addition of subsections (e)(1), (e)(2), (g), (h) and (i) and the purpose behind those additions. *See* H.R. Rep. No. 104-458 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124.

[166] *1998 Pole Order,* 13 FCC Rcd at 6781 ¶ 5 (stating "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, *even though the ILEC has no rights under Section 224 with respect to the poles of other utilities*") (emphasis added), *aff'd, NCTA v. Gulf Power Co.,* 534 U.S. 327 (2002).

[167] *See, e.g.,* Colo. Rev. Stat. § 40-4-105 (1) (Whenever the commission . . . finds that the public convenience and necessity require the use by one public utility of the conduits, subways, tracks, wires, poles, pipes, or other equipment, or any part thereof on, over, or under any street or highway that belongs to another public utility . . . the commission by order may direct that such use be permitted and prescribe reasonable compensation and reasonable terms and conditions for the joint use."); Ind. Code Ann. § 8-1-2-5 (a) ("Every public utility, and every municipality, and every person, association, limited liability company, or corporation having tracks, conduits, subways, poles, or other equipment on, over, or under any street or highway shall for a reasonable compensation, permit the use of the same by any other public utility or by a municipality owning or operating a utility, whenever public convenience and necessity require such use . . . "); N.C. Gen. Stat. § 62-42 (". . . whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds . . . [t]hat additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made... the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions . . ."); 66 Pa. Cons. Stat. § 2904 ("The commission may . . . by order, require any two or more public utilities, whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of facilities . . . to establish and maintain through lines within this Commonwealth between two or more such localities.")

[168] *See, e.g.,* Ala. Code § 37-4-41 ("[T]he question whether the proposed sale and conveyance or lease is consistent with the interests of the public shall be determined by the Public Service Commission, and if the commission determines that the proposed sale and conveyance or lease is consistent with the interests of the public, its determination shall be shown by its approval of the proposed sale and conveyance or lease."); Mo. Rev. Stat. §§ 392.300 and 393.190 (requiring prior approval of the Missouri PSC before electric or phone companies enter lease agreements); R.I. Gen. Laws § 39-3-24 ("With the consent and approval of the division, but not otherwise... [a]ny two (2) or more public utilities doing business in the same municipality or locality within this state, or any two (2) or

based remedies already available.[169] Moreover, states that have preempted the FCC's Section 224 pole attachment authority through certification regulate pole attachment terms between ILECs and electric utilities as well as cable.[170] Congress clearly took relations between ILECs and electric utilities away from the FCC intentionally, and reinforced it with a reverse state preemption right.

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more public utilities whose lines intersect or parallel each other within this state… may enter into contracts with each other that will enable the public utilities to operate their lines or plants in connection with each other."); Tenn. Code Ann. § 65-4-112 ("No lease of its property, rights, or franchises, by any such public utility, and no merger or consolidation of its property, rights and franchises by any such public utility with the property, rights and franchises of any other such public utility of like character shall be valid until approved by the authority…").

[169] Most state statutes treat only ILECs and electric companies as utilities. *See, e.g.,* Ala. Code § 37-4-1; Colo. Rev. Stat. § 40-1-103(1)(a); Ind. Code Ann. § 8-1-2-1; Mo. Rev. Stat. § 386.020; N.C. Gen. Stat. § 62-3 (23); 66 Pa. Cons. Stat. § 102; R.I. Gen. Laws § 39-1-2 (20); Tenn. Code Ann. § 65-4-101 (6).

[170] *See, e.g.,* 26 Del. Code Ann. § 201 ("The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, [and] facilities. . . . Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility…"); 220 Ill. Comp. Stat. § 5/7-102 ("Unless the consent and approval of the Commission is first obtained … [n]o 2 or more public utilities may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other."); Mass. Ann. Laws Ch. 166, § 25A ("Attachment", means any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities."); N.Y. Pub. Serv. Law § 119-a ("The commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles and the use of utility ducts, trenches and conduits.").